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In The

Supreme Court of the United States

October Term, 1983

No. _____

VIRGIL E. TOMPKINS, Individually and as District Superintendent of Liverpool Central School District, JAMES JOHNSON, Individually and as Acting Superintendent of Liverpool Central School District, DENNIS JONES, Individually and as Coordinator of Personnel of Liverpool Central School District, DR. PAUL DAY, Individually and as Chief Medical Inspector for the Liverpool Central School District, F. ROBERT KOLCH, Individually and as Clerk of the Board of Education of the Liverpool Central School District, ARTHUR D. LITTLE, BRUCE C. VOGT, EMILIO CHASSE, DORIS ANN CONNOR, DAVID A. FILES, MARIE HARTWELL, RICHARD J. HAYKO, TONI ANNE MORRIS, LLOYD J. SPAFFORD, as In-

(OVER)

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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dividuals and as Members of the Board of Education of the Liverpool Central School District, THE BOARD OF EDUCATION OF THE LIVERPOOL CENTRAL SCHOOL DISTRICT, Liverpool, New York, and ARNOLD DETTOR, as Hearing Officer appointed pursuant to New York State Education Law,

Petitioners,

v.

LORRAINE GARGIUL,

Respondent.

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Petitioners,

v.

LORRAINE GARGIUL,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on March 29, 1983, to the extent that it reversed and remanded in part the judgment of the United States District Court for the Northern District of New York.

QUESTIONS PRESENTED

1. Whether principles of res judicata bar the federal courts from determining issues raised in actions brought pursuant to 42 U.S.C. §1983, when such issues could have been litigated in earlier state court proceedings between the same parties and involving the same facts?

2. Whether the Second Circuit Court of Appeals misapplied New York law in interpreting Section 913 of the State Education Law as empowering a teacher to require a board of education to delegate the responsibilities of the school district physician to another doctor of the same gender as the teacher?

3. Whether a board of education acts arbitrarily, in violation of a female teacher's right to substantive due process of law, when it requires that teacher to attend a medical examination with the male school district physician, before permitting the teacher to return to classroom teaching following an extended sick leave caused by a back ailment?

OPINIONS BELOW

The opinion of the Second Circuit Court of Appeals is reported at 704 F2d 661 (1983) and is printed in Appendix A hereto, *infra*, page A-1. The opinion of the United States District Court for the Northern District of New York, denying the respondent's motion for partial summary judgment, is reported at 525 F. Supp. 795 (1981), and is printed in Appendix A hereto, *infra*, page A-12. The judgment of the United States District Court for the Northern District of New York, dismissing the respondent's complaint, is unreported, and is printed in Appendix A hereto, *infra*, page A-16.

JURISDICTION

The judgment of the Second Circuit Court of Appeals was entered on March 29, 1983. A timely petition for rehearing and

a suggestion that the action be reheard in banc was denied on May 9, 1983, and this petition for certiorari is being filed within 90 days of said date. This Court's jurisdiction is invoked under 28 U.S.C., §1254(1).

STATUTORY PROVISIONS INVOLVED

United States Code, Title 28:

§1652

> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

United States Code, Title 28:

§1738

> The Acts of legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.
>
> The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of judge of the court that the said attestation is in proper form.
>
> Such Acts, records, and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

New York Education Law:

§913 (McKinney's 1981)

> In order to safeguard the health of children attending the public schools, the board of education or trustees of

any school district or a board of cooperative educational services shall be empowered to require any person employed by the board of education or trustees or board of cooperative educational services to submit to a medical examination by a physician of his choice or school medical inspector of the board of education or trustees or board of cooperative educational services, in order to determine the physical or mental capacity of such person to perform his duties. The person required to submit to such medical examination shall be entitled to be accompanied by a physician or other person of his own choice. The findings upon such examination shall be reported to the board of education or trustees or board of cooperative educational services and may be referred to and considered for the evaluation of service of the person examined or for disability retirement.

STATEMENT OF THE CASE

A. *The State Proceedings**

Lorraine Gargiul ("Gargiul") was a tenured kindergarten teacher employed by the Liverpool Central School District. On November 27, 1974, she commenced an extended sick leave from her teaching duties due to a pre-existing back condition. On February 5, 1975, the Superintendent of Schools, Virgil Tompkins ("Tompkins"), notified Gargiul that she should make arrangements for a medical examination by the school district physician, Dr. Paul Day ("Dr. Day"), before attempting to return to work.

Through a letter dated March 6, 1975, Gargiul expressed her intention to return to her teaching position on March 17, 1975, but refused to be examined by Dr. Day. She indicated that her personal creed precluded her from being examined by a male physician. By subsequent correspondence, Tompkins sought to obtain Gargiul's medical records for evaluation by Dr. Day as a possible alternative to her attendance at a medical examination.

On March 10, 1975, the Board of Education (the "Board")

*A copy of all related state court and administrative decisions are included in Appendix A.

adopted a resolution which directed Gargiul to attend a medical examination by the school district physician before returning to her teaching responsibilities, if the physician should determine that such an examination was necessary after reviewing Gargiul's medical records.

Effective March 17, 1975, the Board placed Gargiul on a leave of absence without pay until such time as the questions regarding her medical status were clarified. After Gargiul's medical records were finally supplied, Dr. Day determined that an examination would be necessary, and Gargiul was so informed.

It is uncontroverted that Gargiul never appeared at the office of Dr. Day and continuously failed and refused to attend an examination with him during this period.

On August 9, 1975, Gargiul commenced an administrative appeal to the New York Commissioner of Education (the "Commissioner") which challenged the Board's resolution of March 10, 1975 on constitutional and statutory grounds. *Matter of Gargiul* 15 Ed. Dept. Rep. 360 (1976). The Commissioner rejected Gargiul's appeal and held that, under the circumstances, the Board did not act arbitrarily or capriciously in requiring her to be examined by the male school district physician and that her wish to be attended by only women physicians is not entitled to protection under the First and Fourteenth Amendments of the United States Constitution. *Matter of Gargiul, supra.* In an application to reopen this decision, Gargiul argued that the Commissioner's ruling permitted an invasion of her constitutional right to personal and sexual privacy. The Commissioner then held that based upon the prior proceeding, this argument was barred by the doctrine of *res judicata. Matter of Gargiul* 15 Ed. Dept. Rep. 520 (1976). Gargiul never sought judicial review of the Commissioner's decisions.

On April 13, 1976, Ms. Gargiul commenced an extraordinary

writ proceeding in state court against the Board, seeking a declaration that the Board's action of March 17, 1975, placing her on a leave of absence without pay for failure to comply with the Board's directive regarding a medical examination by the school district physician, violated her rights under the New York *Education Law* and the Fourteenth Amendment to the United States Constitution. *Gargiul v Board of Education I*, 54 AD2d 1085, 389 NYS2d 504 (4th Dept. 1976), *lv. app. den.* 41 NY2d 802, 393 NYS2d 1026 (1977). The Onondaga County Supreme Court dismissed the proceeding as time-barred, and the Appellate Division affirmed, adding that Gargiul's due process claims were without merit. *Gargiul v Board of Education I, supra.*

In the meantime, on September 9, 1975, the Board determined that there was probable cause to institute dismissal proceedings against Gargiul under State law (New York Education Law, §3020-a) on the independent grounds of insubordination and incompetency. The charges of insubordination were based on Gargiul's repeated failure and refusal to comply with the Board's directive requiring attendance at a medical examination by the school district physician. The charges of incompetency were based upon unfavorable supervisory reports and parental complaints regarding Gargiul's teaching performance.

In due course, a three member hearing panel was convened and a statutory hearing was held on these charges. In its decision, a majority of the hearing panel found Gargiul guilty of both insubordination and incompetency, and recommended dismissal for incompetency.

After reviewing the decision of the hearing panel, the Board, on May 24, 1977, unanimously resolved that Gargiul be dismissed for incompetency. The Board also unanimously resolved that Gargiul was not entitled to back pay for the period of March 17, 1975 to the date of her dismissal on May

24, 1977, since the withholding of compensation during this period was a direct result of her refusal to attend a physical examination as required by *Education Law* §913.

Gargiul then commenced another extraordinary writ proceeding in state court seeking to annul the Board resolution of May 25, 1977 relating to dismissal and back pay. *See, Gargiul v Board of Education II* 69 AD2d 986, 416 NYS2d 119 (4th Dept 1979), *lv. app. den.* 48 NY2d 606, 421 NYS2d 1031 (1979). Upon review, the Appellate Division, confirming the Onondaga County Supreme Court's determination, held that the Board's finding of incompetency was supported by substantial evidence, and that her dismissal was not "shocking to one's sense of fairness". The Court also held that the Board has a statutory right to order an employee to submit to a medical examination and may withhold pay from an employee who refuses to undergo such an examination. *Gargiul v Board of Education II, supra.*

B. ***The Federal Proceedings***

Failing to prevail on any of her state judicial and administrative claims, Gargiul turned her attention to pursuit of the instant case, which had been commenced in 1976 but held in abeyance pending the outcome of the above-described State proceedings.

The crux of Gargiul's federal claim is that the petitioners have impermissively infringed upon her alleged constitutional right of privacy to refuse to undergo a medical examination by a male school district physician, and that this infringement has resulted in a deprivation of her right to substantive due process of law.

On August 20, 1981, Gargiul commenced a Motion for Partial Summary Judgment in District Court to recover back salary and benefits for the period between March 17, 1975 (the commencement date of her leave of absence without pay) and

May 23, 1977 (the date of her termination). In support of this motion, she alleged that there were no material issues of fact in dispute with respect to this claim. It was uncontroverted that Gargiul had not been compensated during this period because of her refusal to attend the examination with the male school district physician.

Honorable Roger J. Miner, Federal District Judge, rendered a memorandum decision and order on October 30, 1981, which denied Gargiul's motion as a matter of law, on the basis that there is no constitutionally recognized right of privacy which would permit her to decline a required medical examination by a male school district physician. This decision also noted that it is not wholly unreasonable for a school district to order an employee to consult a male school district physician. *Gargiul v Tompkins* 525 F Supp 795 (N.D.N.Y. 1981).

In the aftermath of Judge Miner's decision, the Board moved for summary judgment on the ground that, as a matter of law, Gargiul's complaint fails to state a claim upon which relief may be granted. The Court granted the Board's motion and dismissed Gargiul's complaint by a Final Order dated May 17, 1982.

Gargiul then appealed this dismissal to the Second Circuit Court of Appeals. Following oral argument, the Court issued an opinion by Charles H. Tenney, Senior District Judge, which affirmed that Gargiul's claim for wrongful termination is without merit. However, the Court also held that principles of res judicata do not preclude Gargiul from continuing to litigate her claim that the Board violated her right to substantive due process when it suspended her without pay for failure to attend an examination with the school district physician. The Court stated that the doctrine of res judicata has only limited application in §1983 actions and that only matters which are actually litigated and determined in prior state proceedings become barred from federal court review under §1983. In

reaching this conclusion, the Court stated that it declined to follow the Supreme Court's "suggestion" in *Allen v McCurry* 449 U.S. 90, at 96-97, 101 S Ct 441, 66 L Ed 2d 308 (1980) that the principles of res judicata are fully applicable in §1983 actions.

From this premise, the Court opined that the New York Courts have never actually determined the validity of Gargiul's substantive due process claim even though she attempted to raise these claims in that forum. The Court added that the express state court rejection of Gargiul's procedural due process claims was not dispositive of the substantive due process issue.

The Court also determined that it would not follow the unappealed decision of the Commissioner, which ruled that Gargiul's substantive due process rights had not been violated by the Board's actions. The Court stated that even though New York Courts afford preclusive effect to the Commissioner's decisions, the federal courts are not bound to follow suit.

Finally, the Court addressed the merits of Gargiul's substantive due process claim. After interpreting Section 913 of New York's Education Law as empowering a teacher to require a board of education to delegate the responsibilities of the school district physician to another doctor of the same gender as the teacher, the Court held that the Board acted arbitrarily in requiring Gargiul to attend a medical examination with the male school doctor physician. The Court then remanded this matter to the District Court. Petitioner's motion for rehearing was denied on May 9, 1983.

Petitioners now seek Supreme Court review of those portions of the Second Circuit's decision which reversed the District Court's dismissal of Gargiul's complaint.

REASONS FOR GRANTING THE WRIT

POINT I

THE DECISION BELOW CONFLICTS WITH DECISIONS BY MOST OF THE OTHER CIRCUIT COURTS REGARDING THE APPLICABILITY OF RES JUDICATA PRINCIPLES TO FEDERAL ACTIONS UNDER §1983 ON ISSUES WHICH COULD HAVE BEEN LITIGATED IN EARLIER STATE COURT PROCEEDINGS BETWEEN THE PARTIES.

The traditional rule of res judicata in the federal-state context is that when the parties have had a full and fair opportunity to litigate an issue in state court, a final judgment on the merits of the action precludes the parties from relitigating in federal court those issues that (1) were actually raised and determined in the earlier proceedings and (2) could have been, but were not, actually raised and determined in the earlier proceedings. *Allen v McCurry, supra,* 449 US 90, at 94, *Cromwell v County of Sac,* 94 US 351, 352, 24 L Ed 195 (1877). In *Allen v McCurry, supra,* the Court indicated that the first prong of this principle is fully applicable to actions brought under 42 U.S.C. §1983. After examining the legislative history of §1983, the Court concluded that there is no evidence that Congress intended to allow relitigation of federal issues simply because the state court's decision may have been erroneous. *Allen v McCurry, supra,* 449 U.S., at 101. However, the *Allen* Court did not address the second question of whether issues that could have been but which were not litigated and determined in earlier proceedings are also barred from §1983 review. *Allen v McCurry, supra,* 449 US, at 97, f.n. 10. The instant case presents the Court with an opportunity to squarely decide this issue, and thereby eliminate the uncertainty and conflict that exists among the lower courts in the aftermath of the *Allen* decision.

Consistent with the *Allen* rationale, most Circuit Courts

considering the question have adopted the position that res judicata bars the determination of §1983 claims that could have been but were not litigated in earlier state court proceedings. *See, Ramirez Pluguez v Cole,* 571 F2d 70 (1st Cir., 1978); *Manego v Cape Cod Five Cents Savings Bank,* 692 F2d 174 (1st Cir., 1982); *Southern Jam, Inc. v Robinson,* 675 F2d 94 (5th Cir., 1982); *Coogan v Cincinnati Bar Association,* 431 F2d 1209 (6th Cir., 1970); *Lee v City of Peoria,* 685 F2d 196 (7th Cir., 1982); *Brown v St. Louis Police Dept., Etc.,* 691 F2d 393 (8th Cir., 1982); *Board of Trustees of Carpenters Pension v Reyes,* 688 F2d 671 (9th Cir., 1982); *Spence v Latting,* 512 F2d 93 (10th Cir., 1975), *cert den* 423 US 896, 96 S Ct 198, 46 L Ed 2d 129 (1975); and *Jones v Gann,* 703 F2d 513 (11th Cir., 1983). *See also, Harrington v Inhabitants of the Town of Garland, Maine,* 551 F Supp 1371 (D.Ct. Maine, 1982), *Flores v Edinburg Consolidated Independent School District,* 554 F Supp 974 (D.Ct., Texas, 1983).

Nevertheless, the Second Circuit continues to adhere to the contrary rule originally enunciated in the case of *Lombard v Board of Education,* 502 F2d 631 (2d Cir., 1974), *cert. den.* 420 US 976, 95 S Ct 1400, 43 L Ed 2d 656 (1975). As the Court below stated:

> . . . [W]e have held that a prior state court proceeding does not bar federal court consideration of constitutional claims not actually litigated and determined in that proceeding . . . 704 F2d, at 666.

The Third Circuit is the only other Circuit that appears to be in accord with the *Lombard* rule. In a pre-Allen case entitled *New Jersey Educational Association v Burke,* 579 F2d 764, 774 (3d Cir., 1977), *cert. den.* 439 US 894, 99 S Ct 252, 58 L Ed 2d 239 (1978), that Court held that a state court judgment forecloses a §1983 litigant from raising grievances in federal court only if such claims have been pressed before, and decided by, a state tribunal. *See also, Bartholomew v Fischl,* 534 F Supp 161 (E.D. Pa., 1981).

In the wake of *Allen*, even district courts within the Second Circuit have questioned the viability of the *Lombard* rule. For example, in *Sachetti v Blair*, 536 F Supp 636 (S.D.N.Y., 1982), the Court stated:

> . . . [T]he *Lombard* rule appears to be so clearly contrary to statements by the Supreme Court in the recent case of *Allen v McCurry* that *Lombard* can no longer be regarded as controlling authority even in this circuit.

One leading commentator has severely criticized the continuing vitality of this minority rule with the following comments:

> The Second Circuit refusal to apply claim preclusion seems inconsistent with the Allen opinion in several ways. The full faith and credit statute [28 U.S.C. 1738] applies to claim preclusion as well as issue preclusion. There is no more apparent reason to find special rules of claim preclusion in the legislative history of §1983 than to find special rules as to issue preclusion. And freedom to go to federal court in defiance of state claim preclusion rules and at the expense of orderly state procedure can be justified most easily by relying on propositions rejected by the [Allen] Court — that state courts cannot be trusted to adjudicate federal rights, or that every person asserting a federal right should have an opportunity to advance it in federal court. 18 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure §4471, at 719-20 (1981).

Nevertheless, the Second Circuit applied the *Lombard* rule to the facts of the instant case as follows:

> . . . In neither judicial proceeding did the state court address the merits of her substantive due process claims. In *Gargiul v Board of Education I, supra,* Gargiul argued that the due process clause of the fourteenth amendment protected her, a tenured teacher, from suspension without pay prior to a final determination of the charges against her. The Appellate Division rejected Gargiul's claim that her due process rights had been violated. 54 AD2d at 1087, 389 NYS2d at 506. While

> that decision clearly bars Gargiul from relitigating her claim that her suspension without pay violated her procedural due process rights, it is not dispositive of her substantive due process claims, which she did not raise in that proceeding.
>
> Gargiul did attempt to raise her substantive due process claims in *Gargiul v Board of Education II, supra.* The Appellate Division upheld her suspension without pay on statutory grounds. However, the court concluded that Gargiul's failure to appeal the Commissioner of Education's determination of the constitutionality of her suspension or to join the Commissioner as a party precluded her from relitigating the constitutionality of her suspension without pay. 69 AD2d at 986, 416 NYS2d at 120. Thus, in neither case did the state court determine the merits of Gargiul's substantive due process claims . . .
>
> Under the rationale of *Lombard v Board of Education, supra,* and its progeny, Gargiul's privacy claim — never actually litigated and determined — should not be precluded 704 F2d, at 666.

It is inequitable for defendants in the Second Circuit to be required to relitigate issues in multiple forms while similarly situated defendants throughout most of the rest of the country enjoy judicial protection from fractious, resurrected claims. The instant case, for example, has been in litigation for almost nine years. It continues forward, primarily because the Second Circuit is unwilling to conclude that state court rejection of Gargiul's statutory and procedural due process claims has subsumed resolution of her substantive due process claim. Such judicial hair-splitting is certain to promote multi-forum lawsuits by litigious plaintiffs and extinguish the faint hope that overburdened District Courts in this Circuit will someday regain control of their dockets. This issue cries out for Supreme Court attention and we beseech the Court to intervene. As Justice White wrote last October:

> . . . The issue of whether constitutional claims not actually litigated in earlier state proceedings are barred in a subsequent federal suit is of considerable importance to §1983 litigants and has divided the federal courts of appeal. . . . I would grant certiorari. *Castorr v Brandage, etc., et al.*, ____ U.S. ____, 103 S. Ct. 240, 74 L Ed 2d 189 (1982) (dissenting opinion from denial of certiorari).

Even if the Supreme Court is willing to countenance further Second Circuit experimentation with the *Lombard* rule, the instant case presents an ideal opportunity for the Court to clarify the difference between a claim that has been actually litigated and one that has not.

In holding that res judicata principles do not preclude Gargiul from challenging her suspension without pay on substantive due process grounds, the Court below concluded that the New York Courts have never determined the question of her substantive due process rights. While it may be true that Gargiul did not have the validity of her initial *suspension* reviewed from this perspective in the state court, this conclusion overlooks the fact that she did have state judicial review of the Board's subsequent determination that she was not entitled to *back pay* during the suspension period. In *Gargiul v Board of Education, II*, 69 AD2d 986, 416 NYS2d 119 (4th Dept., 1979), the New York State Appellate Division (Fourth Department) held:

> We do not agree with [Gargiul's] contention that she should be awarded back pay from March 17, 1975, the date on which she was suspended for refusing to submit to the physical examination directed by the Board, to the date of her dismissal. A Board of Education has a statutory right to order an employee to submit to a medical examination (Education Law §913) and may dismiss an employee who refuses to undergo such an examination (*Matter of Grasso*, 4 E.D.R. 174).

In other words, the Appellate Division upheld the reason-

ableness of the Board's determination that Gargiul be dismissed from her employment retroactive to March 17, 1975, without back pay. Under 28 U.S.C. §1738, the federal courts are bound to accede to this state court decision.

This Court is therefore urged to accept certiorari to at least determine the extent to which the *Lombard* rule should apply to the instant case. We submit that the Board's initial directive suspending Gargiul without pay was examined and upheld by the state court on its merits when it reviewed the Board's later determination that she was not entitled to back pay for the period of suspension prior to her dismissal. Substantive due process claims were raised by Gargiul in this proceeding, and were necessarily subsumed within the Court's determination. With respect at least to back pay, the plaintiff has crossed the line at which res judicata attaches. *See, Kremer v Chemical Construction Corporation,* ____ US ____, 102 S. Ct. 1883, 72 L Ed 2d 262 (1982).

POINT II

CERTIORARI SHOULD BE GRANTED TO RECONCILE THE CONFLICTING INTERPRETATIONS OF NEW YORK EDUCATION LAW §913 WHICH HAVE BEEN RENDERED BY THE STATE AND FEDERAL COURTS IN THIS CASE.

The Court below concluded that Section 913 of the New York Education Law sanctions Gargiul's demand for an alternative to an examination by the school district physician — an examination by some other physician who is female. This misapprehends the law concerning this state statute. In *Matter of Grasso,* 4 Educ. Dept. Rep. 174 (1965), New York's Commissioner of Education stated:

> This statute clearly gives to a board of education the *right* to order an employee to a medical examination by a physician of the employee's choice or, if the board so

> desires, by the board's medical inspector. *The board may make demand for either type of examination as it chooses.* If this were not so, the remaining language of the section would be meaningless. (Emphasis added).

The Commissioner's interpretation of Section 913 in *Grasso* was followed by the Commissioner in *Matter of Gargiul, supra,* and again by the state court in *Gargiul v Board of Education, II, supra.* State courts are the final arbiters of the state's own laws, and federal courts are duty bound to follow state appellate court interpretations of statutory language. *Rules of Decision Act,* 28 U.S.C. §1652. There is absolutely no state court authority which supports the conclusion that *Education Law* §913 enables a teacher to require a board of education to delegate the responsibilities of the office of school physician to another doctor. This contrary interpretation of *Education Law* §913 adversely affects every board of education in the State of New York by eradicating its longstanding prerogative to appoint and rely upon one particularly qualified expert to act as the district physician.

Moreover, it is state law which defines the scope of a teacher's property rights to compensation. *See, Bishop v Wood,* 426 US 341, at 344, 96 S Ct 2074, 48 L Ed 2d 684 (1976), *Board of Regents of State Colleges v Roth,* 408 US 564, 577, 92 S Ct 2701, 33 L Ed 2d 548 (1972). When a board of education acts in accordance with a valid state law, it cannot be said to have violated a teacher's constitutional rights. Since the Commissioner and the New York Courts have both determined that the petitioner Board has acted in conformity with *Education Law* §913, and since that statute was not declared unconstitutional as applied in the Court below, the conclusion is inescapable that the Second Circuit interpreted *Education Law* §913 in a way which directly contradicts the meaning ascribed by the state appellate court. The petitioners thus contend that the Second Circuit has violated the *Rules of Decision Act* in this case.

The Supreme Court should accept certiorari to reconcile the conflicting interpretations of *Education Law* §913 rendered by the state and federal courts.

POINT III

CERTIORARI SHOULD BE GRANTED TO REVIEW THE IMPORTANT QUESTION OF WHETHER A BOARD OF EDUCATION ACTS ARBITRARILY, IN VIOLATION OF A FEMALE TEACHER'S RIGHT TO SUBSTANTIVE DUE PROCESS OF LAW, WHEN IT REQUIRES THAT TEACHER TO ATTEND A MEDICAL EXAMINATION WITH THE MALE SCHOOL DISTRICT PHYSICIAN, BEFORE PERMITTING THE TEACHER TO RETURN TO CLASSROOM TEACHING FOLLOWING AN EXTENDED SICK LEAVE CAUSED BY A BACK AILMENT.

Substantive due process is the constitutional guarantee that no person shall be deprived of his or her life, liberty, or property by arbitrary governmental action. *Wolff v McDonnell*, 418 US 539, 94 S Ct 2963, 41 L Ed 2d 935 (1974), *Slochower v Board of Higher Education*, 350 US 551, 76 S Ct 637, 100 L Ed 2d 692, reh. den. 351 US 944, 76 S Ct 843, 100 L Ed 1470 (1956). Under this guarantee, the government may not place an arbitrary condition upon the continued enjoyment of a property interest. This protection extends to tenured public employment. *See, Elrod v Burns*, 427 US 347, 360-61, 96 S Ct 2673, 49 L Ed 2d 547 (1976), *Perry v Sindermann*, 408 US 593, 597, 92 S Ct 2694, 33 L Ed 2d 570 (1972); *Pickering v Board of Education*, 391 US 563, 88 S Ct 1731, 20 L Ed 2d 811 (1968). The incentive of employment is a powerful one which cannot be used to abridge the exercise of constitutional freedoms. *Keyishian v Board of Regents*, 385 US 589, 605-06, 87 S Ct 675, 17 L Ed 2d 629 (1967).

However, governmental actions that have some effect on individual liberty or privacy may not be held unconstitutional

simply because a court finds them unnecessary in whole or in part. *Whalen v Roe,* 429 U.S. 589, 597, 97 S Ct 869, 61 L Ed 2d 64 (1977). It is axiomatic that an exercise of governmental power need only bear some rational relationship to a legitimate governmental interest in order to pass constitutional muster. *See, Williamson v Lee Optical, Inc.,* 348 US 483, 488-91, 75 S Ct 461, 99 L Ed 563, *reh. den.* 349 US 925, 75 S Ct 657, 99 L Ed 1256 (1955); and the states have broad latitude in experimenting with possible solutions to problems of vital local concern. *Whalen v Roe, supra,* quoting *New State Ice Co. v Liebmann,* 285 US 262, 311, 52 S Ct 371, 76 L Ed 747 (J. Brandeis, dissenting) (1932).

The government's power to set forth work requirements for its own employees is much broader than its power to rule the citizenry at large. *Kelley v Johnson,* 425 US 238, 244, 96 S. Ct. 1440, 47 L Ed 2d 708 (1976). In *Kelley,* the Court stated:

> . . . [W]e have sustained comprehensive and substantial restrictions upon activities of both federal and state employees lying at the core of the First Amendment . . . If such state regulations may survive challenges based on the explicit language of the First Amendment, there is surely even more room for restrictive regulations of state employees where the claim implicates only the more general contours of the substantive liberty interest protected by the Fourteenth Amendment. 425 U.S. at 245. (citations omitted).

In the instant case, the New York Appellate Division upheld the Board's position that the directive regarding Gargiul's attendance at a medical examination by the school district physician was an entirely reasonable attempt to safeguard the health, education and welfare of the kindergarten children who would have been in her class.

Despite this finding, the Court below determined that the Board acted arbitrarily in requiring that the medical examination be accomplished by the school district physician.

It is difficult to understand how the Court could reach this conclusion, since the Board was merely acting in accordance with prevailing state law in demanding that an employee permit an appointed official to perform one of the responsibilities of his office. In *Cleveland Board of Education et. al. v LaFleur,* 414 U.S. 632, 94 S Ct 791, 39 L Ed 2d 52 (1974), the Court suggested that board of education action requiring teachers to submit to a medical examination by the school district physician was a reasonable method of determining their fitness to return to the classroom. *Id,* at f.n. 14.

The Board has an interest in maintaining uniformity and achieving equity in the evaluation of the fitness of teachers. Such uniformity can reasonably be achieved by giving the responsibility to conduct medical examinations to one particularly qualified expert who fully understands both the job-related physical requirements which the employees must satisfy, and the scope of the duties which the employees must perform. This objective would be defeated if private doctors were permitted to usurp the role of the school district physician in every individual case.

The Board's interest in ensuring high quality education for the children in the school district depends upon maintaining continuity in the delivery of educational services. *Cleveland Board of Education et. al. v LaFleur, supra.* The expertise of the school district physician may be relied upon to ensure that a teacher returning to the classroom is able to perform the duties of that position for a substantial period of time; and only a physician familiar with the various positions available in the school district could accomplish this objective.

We submit that the Board was under no constitutional obligation to delegate this responsibility to another doctor.

Moreover, the Court's conclusion that the Board's actions with respect to Gargiul's suspension were arbitrary, is based upon the assumption that Gargiul's appearance before the

school district physician would have required her to disrobe and submit to an intrusive ("hands on") physical examination by the school district physician. This assumption is completely unwarranted by the record in this case. In an October 16, 1981 affidavit, submitted in opposition to Gargiul's motion for summary judgment, the school district physician, Dr. Day, stated:

> I testified under oath at the Section 3020-a hearing requested by the plaintiff (Gargiul). I stated at that time and I reaffirm now that I did not know if a "hands on" examination of the plaintiff would have been necessary . . .
>
> At this point, I can only speculate as to what would have been required because the plaintiff refused throughout these proceedings to report to my office for the initial meeting, thereby preventing me from obtaining a full history and reaching any preliminary conclusions.

In short, we contend that requiring an employee to attend a medical examination of a back ailment does not *ipso facto* entail a violation of substantive due process. The employee should be obligated to at least attend the examination and participate in any aspect of an examination that is not constitutionally objectionable.

We urge this Court to accept certiorari to correct the error of the Court below on this important question.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Second Circuit.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1983

No. _____

VIRGIL E. TOMPKINS, Individually and as District Superintendent of Liverpool Central School District, JAMES JOHNSON, Individually and as Acting Superintendent of Liverpool Central School District, DENNIS JONES, Individually and as Coordinator of Personnel of Liverpool Central School District, DR. PAUL DAY, Individually and as Chief Medical Inspector for the Liverpool Central School District, F. ROBERT KOLCH, Individually and as Clerk of the Board of Education of the Liverpool Central School District, ARTHUR D. LITTLE, BRUCE C. VOGT, EMILIO CHASSE, DORIS ANN CONNOR, DAVID A. FILES, MARIE HARTWELL, RICHARD J. HAYKO, TONI ANNE MORRIS, LLOYD J. SPAFFORD, as Individuals and as Members of the Board of Education of the Liverpool Central School District, THE BOARD OF EDUCATION OF THE LIVERPOOL CENTRAL SCHOOL DISTRICT, Liverpool, New York, and ARNOLD DETTOR, as Hearing Officer appointed pursuant to New York State Education Law,

Petitioners,

v.

LORRAINE GARGIUL,

Respondent.

CERTIFICATE OF SERVICE

I hereby certify that on this ____ day of July, 1983, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to Alfred R. Tyminski, Esq., P.O. 181, Marcellus, New York 13108, Counsel for the Respondent. I further certify that all parties required to be served have been served.

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O'HARA, LAHM & FELICE
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Liverpool, New York 13088

Counsel for Petitioners

APPENDIX

Lorraine GARGIUL, Plaintiff-Appellant,

v.

Virgil E. TOMPKINS, Individually and as District Superintendent of Liverpool Central School District, James Johnson, Individually and as Acting Superintendent of Liverpool Central School District, Dennis Jones, Individually and as Coordinator of Personnel of Liverpool Central School District, Dr. Paul Day, Individually and as Chief Medical Inspector for the Liverpool Central School District, F. Robert Kolch, Individually and as Clerk of the Board of Education of the Liverpool Central School District, Arthur D. Little, Bruce C. Vojt, Emilio Chasse, Doris Ann Connor, David A. Files, Marie Hartwell, Richard J. Hayko, Toni Anne Morris, Lloyd J. Spafford, as Individuals and as Members of the Board of Education of the Liverpool Central School District, the Board of Education of the Liverpool Central School District, Liverpool, New York, and Arnold Dettor, as Hearing Officer appointed pursuant to New York State Education Law, Defendants-Appellees.

No. 483, Docket 82-7482.

United States Court of Appeals,
Second Circuit.

Argued Nov. 19, 1982.

Decided March 29, 1983.

Former kindergarten teacher appealed from an order of the United States District Court for the Northern District of New York, Roger J. Miner, J., which dismissed her complaint under section 1983 which alleged violations of her constitutional rights

to privacy and to substantive due process of law. The Court of Appeals, Tenney, Senior District Judge, sitting by designation, held that: (1) kindergarten teacher's claim that school board violated her constitutional rights in dismissing her for incompetency was barred by collateral estoppel; (2) where kindergarten teacher's challenge to her suspension on substantive due process grounds was determined adversely to her in a state administrative proceeding and where New York state court never reviewed Commissioner of Education's legal determination but merely held that teacher was bound by Commissioner's decision because she had not challenged it on direct appeal or joined Commissioner in that proceeding, kindergarten teacher was not precluded from challenging her suspension without pay on substantive due process grounds in a section 1983 action; and (3) if tenured kindergarten teacher offered to go at her own expense to any female physician selected by school board rather than to submit to a physical examination by male school district physician, and if school board suspended her without pay for her failure to submit to examination by school district physician, then board's action would be considered arbitrary and violate teacher's substantive due process rights.

Affirmed in part, reversed in part and remanded.

Oakes, Circuit Judge, filed separate opinion concurring in the judgment.

1. Judgment — 828(3.42)

While a section 1983 plaintiff may not relitigate constitutional claims actually determined in a prior state court proceeding, prior state court proceeding does not bar federal court consideration of constitutional claims not actually litigated and determined in that proceeding. 42 U.S.C.A. § 1983.

2. Judgment — 828(3.41)

Kindergarten teacher's claim that school board violated her constitutional rights in dismissing her for incompetency because that charge was allegedly motivated by her refusal to be examined by a male school district physician, was barred by collateral estoppel since state court had found that teacher would have been dismissed for a constitutionally permissible reason regardless of her refusal to be examined by the male physician; thus, kindergarten teacher could not relitigate the basis, and, in consequence, the constitutionality of her dismissal in her section 1983 action. 42 U.S.C.A. § 1983.

3. Judgment — 828(3.9)

Where kindergarten teacher's challenge to her suspension on substantive due process grounds was determined adversely to her in a state administrative proceeding and where New York state court never reviewed Commissioner of Education's legal determination but merely held that teacher was bound by Commissioner's decision because she had not challenged it on direct appeal or joined Commissioner in that proceeding, kindergarten teacher was not precluded from challenging her suspension without pay on substantive due process grounds in a section 1983 action. 42 U.S.C.A. § 1983.

4. Judgment — 828(3.9)

Even where res judicata effect can attach to state administrative proceedings, doctrine is not mechanically applied as application depends on a number of factors, including: (1) effect which such determinations are accorded by courts of the jurisdiction within which they are made; (2) type of hearing which is held and the procedures which are followed by the agency; and (3) intention of administrative body and expectations of the parties before it on the question of finality.

5. Constitutional Law — 278.5(3)

If tenured kindergarten teacher, who took an extended sick leave because of a back ailment, offered to go at her own expense to any female physician selected by school board rather than to submit to a physical examination by male school district physician, and if school board suspended her without pay for her failure to submit to examination by school district physician, then board's action would be considered ar-

bitrary and violate teacher's substantive due process rights. U.S.C.A. Const. Amend. 14; N.Y. McKinney's Education Law § 913.

Alfred R. Tyminski, Marcellus, N.Y., for plaintiff-appellant.

Kenneth A. Windstein, O'Hara, Lahm & Felice, Liverpool, N.Y., for defendants-appellees.

Before FEINBERG, Chief Judge, OAKES, Circuit Judge, and TENNEY, District Judge.*

TENNEY, Senior District Judge.

Lorraine Gargiul, formerly a tenured schoolteacher with the Liverpool Central School District, appeals from an order of summary judgment entered May 17, 1982 by Roger J. Miner,

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*Honorable Charles H. Tenney, Senior District Judge of the Southern District of New York, sitting by designation.

Judge, of the District Court for the Northern District of New York. Judge Miner dismissed Gargiul's § 1983 action against Virgil E. Tompkins, the District Superintendent of the Liverpool Central School District, various officials of the school district, and the Board of Education and its members, on the ground that it failed to state a claim upon which relief could be granted. Gargiul contends that the School Board infringed her constitutional rights by suspending her, and subsequently by dismissing her, for refusing to be examined by a male school district physician. She seeks reinstatement, back pay, and damages for injury to her reputation. Because we conclude that Gargiul's constitutional challenge to her dismissal is barred by collateral estoppel, we affirm the district court's dismissal of that claim. However, for the reasons set forth below, we reverse with respect to the dismissal of Gargiul's constitutional challenge to her suspension without pay.

Since this is an appeal from a judgment of dismissal, we accept as true the facts alleged in the complaint. *Kirshner v. United States*, 603 F.2d 234, 236 (2d Cir. 1978), *cert. denied*, 442 U.S. 909, 99 S.Ct. 2821, 61 L.Ed.2d 274, *cert. denied*, 444 U.S. 995, 100 S.Ct. 531, 62 L.Ed.2d 426 (1979); *Murray v. City of Milford*, 380 F.2d 468, 470 (2d Cir. 1967).

Background

Appellant Lorraine Gargiul was a tenured kindergarten teacher in the Liverpool Central School District.[1] In November 1974 she took an extended sick leave because of a back ailment. On February 5, 1975 the Superintendent of Schools, Virgil Tompkins, notified Gargiul that she should report to the school district physician, Dr. Paul Day, for a physical examination. In

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[1]Gargiul had requested assignment to a first grade teaching position for the 1974-75 school year. However, because there were no openings for first grade teachers at Liverpool Elementary School, where she wanted to teach, she continued as a kindergarten teacher.

response, Gargiul informed Tompkins that she would be able to return to work on March 17, 1975, and submitted a certificate from her own physician. Gargiul refused, however, to make an appointment with Dr. Day. She explained that she had always gone to women physicians and that it was against her "creed" to be examined by a male physician. She offered instead to go, at her own expense, to any woman physician selected by Tompkins or recommended by a local medical society.

On March 10, 1975, the Board of Education adopted a resolution requiring Gargiul to be examined by Dr. Day if he felt that a physical examination was necessary after reviewing her medical records. The Board suspended Gargiul without pay effective March 17, 1975 until Dr. Day could determine whether she was physically able to return to her teaching position.

It was apparently not until the summer that Dr. Day decided that an examination would be necessary. Accordingly, in a letter dated July 30, 1975 James R. Johnson, the Acting Superintendent of Schools, directed Gargiul to report to Dr. Day for a physical examination. Gargiul reiterated her refusal to be examined by a male physi

cian and repeated her offer to be examined by any woman doctor at her own expense.

On August 9, 1975, the Board of Education determined that there was probable cause to issue charges against Gargiul of insubordination, based on her refusal to be examined by Dr. Day, and incompetency, based on unfavorable supervisors' reports and parents' complaints.

Gargiul appealed her suspension without pay to the Commissioner of Education pursuant to New York Education Law § 310. The Commissioner dismissed her appeal, concluding that because the Board was empowered by New York Education Law § 913[2] to require Gargiul to submit to an examination by Dr. Day, it had not acted arbitrarily or capriciously in suspending her. The Commissioner also rejected Gargiul's argument that an examination by a male physician was contrary to her creed. *In re Gargiul I,* 15 Educ. Dept. Rep. 360 (1976). In an application to reopen the Commissioner's decision, Gargiul argued, inter alia, that requiring her to be examined by a male physician violated her constitutional right to privacy. The Commissioner denied her application. He held that Gargiul, having failed to raise her privacy claim earlier, was barred from doing so by the doctrine of res judicata. *In re Gargiul II,* 15 Educ. Dept. Rep. 520 (1976). Gargiul did not appeal his decision.

Between the time that the Commissioner's first and second decisions were handed down, Gargiul commenced an Article 78 proceeding in state court, challenging the Board's resolution to suspend her without pay. The Onondaga County Supreme Court dismissed the proceeding as time barred. The Appellate Division affirmed on that basis, concluding further that the due process claim Gargiul had advanced was without merit. *Gargiul v. Board of Education I,* 54 A.D.2d 1085, 389 N.Y.S.2d 504 (1976), *leave to appeal denied,* 41 N.Y.2d 802, 393 N.Y.S.2d 1026, 362 N.E.2d 626 (1977).

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[2]N.Y. Educ. Law § 913 (McKinney 1982-83 Supp.), in effect at the time of Gargiul's suspension, provides in pertinent part that:

> In order to safeguard the health of children attending the public schools, the board of education or trustees of any school district . . . shall be empowered to require any person employed by the board of education or trustees . . . to submit to a medical examination by a physician of his choice or school medical inspector for the board of education or trustees . . . in order to determine the physical or mental capacity of such person to perform his duties.

Meanwhile, a tenure hearing panel was convened and hearings were held concerning the charges against Gargiul. In a decision dated April 4, 1977, a majority of the panel found Gargiul guilty of incompetency and recommended that she be dismissed. The panel also recommended that she be restored to the payroll retroactive to March 17, 1975, and retained on the payroll until the termination of the proceedings against her.

In a resolution adopted May 23, 1977, the Board dismissed Gargiul on the ground of incompetency. The Board concluded that in view of its decision to dismiss Gargiul, further punishment for insubordination was unwarranted. However, the Board rejected the hearing panel's recommendation that Gargiul be paid for the period of her suspension, because her suspension without pay was the result of her refusal to be examined by Dr. Day.

Finally, Gargiul commenced a second Article 78 proceeding in state court, this time challenging the Board's resolution of May 23, 1977. The Appellate Division held that there was substantial evidence to support Gargiul's dismissal on the ground of incompetency, and thus did not reach the constitutional issues concerning the charge of insubordination. *Gargiul v. Board of Education II*, 69 A.D.2d 986, 416 N.Y.S.2d 119, *leave to appeal denied*, 48 N.Y.2d 606, 421 N.Y.S.2d 1031, 397 N.E.2d 760 (1979). The court also concluded that because Gargiul had not directly appealed the Commissioner's decision or joined him in the proceeding, she was bound by his determination and could not relitigate the constitutional issues concerning her suspension without pay. 69 A.D.2d at 986, 416 N.Y.S.2d at 120.

Early in the course of the state proceedings, Gargiul commenced this action in federal court pursuant to 42 U.S.C. § 1983 and its jurisdictional counterparts, 28 U.S.C. §§ 1331 and 1343(3). Her complaint alleges violations of her rights under the first, fourth, ninth, and fourteenth amendments to the Constitution. She claims that the Board's actions impermissibly infringed her right to substantive due process of law, and particularly, her right to privacy. This action, however, was held in abeyance until the termination of all state proceedings. After Gargiul was denied leave to appeal the Appellate Division's decision in *Gargiul v. Board of Education II, supra,* she moved for partial summary judgment in this action to recover back salary and benefits for the period between March 17, 1975, the date of her suspension and May 23, 1977, the date of her dismissal. In an opinion filed October 30, 1981 the district court denied her motion, on the ground that her refusal to be examined by a male physician was "a mere predilection against male physicians," not protected by her constitutional right of privacy. The court also stated that the Board's actions were not "wholly unreasonable." Defendants then moved for summary judgment on the ground that the complaint fails to state a claim upon which relief may be granted. The district court granted defendants' motion and dismissed the complaint. It is from this dismissal that Gargiul now appeals.

Discussion

We consider at the outset whether Gargiul's claims are barred by the earlier state proceedings under principles of res judicata and collateral estoppel. The traditional rule of res judicata is that a final judgment on the merits of an action precludes the parties from relitigating issues actually raised and

determined in that action, as well as issues that could have been, but were not, raised and determined in that action. *Allen v. McCurry,* 449 U.S. 90, 94, 101 S.Ct. 411, 414, 66 L.Ed.2d 308 (1980) (citing *Cromwell v. County of Sac,* 94 U.S. 351, 352, 24 L.Ed. 195 (1877)); *Saylor v. Lindsley,* 391 F.2d 965, 968 (2d Cir. 1968). The traditional rule of collateral estoppel precludes a party from relitigating issues already litigated and determined adversely to him in a prior action, where the adverse determination was necessary to the judgment in that action. *Allen v. McCurry, supra,* 449 U.S. at 94, 101 S.Ct. at 414 (citing *Montana v. United States,* 440 U.S. 147, 153, 99 S.Ct. 970, 973, 59 L.Ed.2d 210 (1979)).

[1] Because 28 U.S.C. § 1738[3] requires a federal court to give a state court judgment "the same force and effect as it has in the state in which it was rendered," *Mitchell v. National Broadcasting Co.,* 553 F.2d 265, 274 (2d Cir. 1977) (citations omitted), we would ordinarily apply the traditional rule of res judicata — the rule applied by New York courts, *Winters v. Lavine,* 574 F.2d 46, 55-56 (2d Cir. 1978) (collecting cases) — to determine whether Gargiul's claims are precluded. However, this court for policy reasons had declined, in civil rights cases, to apply the "traditional Draconian formulation of the rule of

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[3] 28 U.S.C. § 1738 provides:

> The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.
>
> The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.
>
> Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

res judicata," *id.* at 56, despite the Supreme Court's suggestion that the principles of res judicata may be fully applicable in § 1983 actions, *Allen v. McCurry, supra,* 449 U.S. at 96-97, 101 S.Ct. at 415-16. Thus, while a § 1983 plaintiff may not relitigate constitutional claims actually determined in a prior state court proceeding, *Allen v. McCurry, supra; Win-*

ters v. Lavine, supra, we have held that a prior state court proceeding does not bar federal court consideration of constitutional claims not actually litigated and determined in that proceeding. *Ornstein v. Regan,* 574 F.2d 115, 117 (2d Cir. 1978); *Newman v. Board of Education,* 508 F.2d 277, 278 (2d Cir.), *cert. denied,* 420 U.S. 1004, 95 S.Ct. 1447, 43 L.Ed.2d 762 (1975); *Lombard v. Board of Education,* 502 F.2d 631, 635-37 (1974), *cert. denied,* 420 U.S. 976, 95 S.Ct. 1400, 43 L.Ed.2d 656 (1975). *See Winters v. Lavine, supra,* 574 F.2d at 57 (res judicata, applied in this context, "displays the predominant characteristic of the rule of collateral estoppel").

In this case, Gargiul claims that the Board violated her constitutional rights by suspending her without pay for refusing to be examined by Dr. Day. She also claims that the Board violated her constitutional rights in dismissing her for incompetency, because the charge of incompetency was motivated by her refusal to be examined by Dr. Day.

[2] Gargiul's latter claim is clearly barred by collateral estoppel. She raises here the same argument that she raised before the Appellate Division in *Gargiul v. Board of Education II, supra.* The Appellate Division concluded that there was substantial evidence to support her dismissal on the in-

dependent ground of incompetency. 69 A.D.2d at 986, 416 N.Y.S.2d at 120. The court found, essentially, that Gargiul would have been dismissed for a constitutionally permissible reason regardless of her refusal to be examined by Dr. Day. Therefore, Gargiul may not relitigate the basis, and, in consequence, the constitutionality of her dismissal. *See Winters v. Lavine, supra,* 574 F.2d at 63-66.

[3] Gargiul's challenge to the constitutionality of her suspension without pay stands on somewhat different footing, however. In neither judicial proceeding did the state court address the merits of her substantive due process claims. In *Gargiul v. Board of Education I, supra,* Gargiul argued that the due process clause of the fourteenth amendment protected her, a tenured teacher, from suspension without pay prior to a final determination of the charges against her. The Appellate Division rejected Gargiul's claim that her due process rights had been violated. 54 A.D.2d at 1087, 389 N.Y.S.2d at 506. While that decision clearly bars Gargiul from relitigating her claim that her suspension without pay violated her procedural due process rights, it is not dispositive of her substantive due process claims, which she did not raise in that proceeding.

Gargiul did attempt to raise her substantive due process claims in *Gargiul v. Board of Education II, supra.* The Appellate Division upheld her suspension without pay on statutory grounds. However, the court concluded that Gargiul's failure to appeal the Commissioner of Education's determination of the constitutionality of her suspension or to join the Commissioner as a party precluded her from relitigating the constitutionality of her suspension without pay. 69 A.D.2d at 986, 416 N.Y.S.2d at 120. Thus, in neither case did the state court determine the merits of Gargiul's substantive due process claims.

The decision of the Commissioner of Education, by which the state court held Gargiul bound, rejected most of Gargiul's

constitutional arguments on their merits. *In re Gargiul I, supra.* However, the Commissioner never addressed the merits of Gargiul's claim that her actions were protected by her constitutional right of privacy. She did not raise her privacy claim at the hearing before the Commissioner, and when she advanced it as a basis for reopening his decision, he held that the claim was barred under the doctrine of res judicata. *In re Gargiul II, supra.* Under the rationale of *Lombard v. Board of Education, supra,* and its progeny, Gargiul's privacy claim — never actually litigated and determined — should not be precluded.

The remaining question, then, is whether this adverse administrative determination of Gargiul's other constitutional claims precludes their relitigation in federal court. In *Mitchell v. National Broadcasting Co., supra,* we drew a distinction between the res

judicata effect accorded to state judicial proceedings and that accorded to state administrative proceedings. We held that res judicata attaches when a claimant "crosses the line between state agency and state judicial proceedings," and pursues his claim "to a final judicial determination." 553 F.2d at 276; *see Keyse v. California Texas Oil Corp.,* 590 F.2d 45, 47 n. 1 (2d Cir. 1978). Although *Mitchell* involved a § 1981 action, considerations that support this distinction — particularly, the desirability of having state administrative agencies attempt conciliation of claims before a lawsuit is filed in federal court — are no less valid here.

The facts of this case differ significantly from those of

Mitchell, however. In *Mitchell,* we gave preclusive effect to a state agency determination that had been *directly appealed* by the plaintiff and *affirmed* by the state court. We pointed out that

> [i]t is reasonable to question whether . . . a legal determination . . . made only by administrative officials, should bar consideration of the complaint by a federal court. But in this case, five judges of New York State's second highest court reviewed the agency's legal finding.

553 F.2d at 276. Gargiul, on the other hand, never directly appealed the adverse administrative determination. And, unlike the state court in *Mitchell,* the state court here never reviewed the Commissioner's legal determination. The state court merely held that Gargiul was bound by the Commissioner's decision, because she had not challenged it on direct appeal or joined the Commissioner in that proceeding. Under these circumstances, Gargiul cannot be said to have "crossed the line" at which res judicata attaches.

[4] Furthermore, even where res judicata effect can attach to state administrative proceedings, the doctrine is not mechanically applied. Its application depends on a number of factors, including

> (1) the effect which such determinations are accorded by the courts of the jurisdiction within which they are made; (2) the type of hearing which is held and the procedures which are followed by the agency; and (3) the intention of the administrative body and the expectations of the parties before it on the question of finality. *See* Restatement, Judgments § 4 (1942); ALI, Restatement 2d, Conflicts of Laws § 92, and Reporter's Note, at 341 (P.O.D., Pt. I 1967).

Mitchell v. National Broadcasting Co., supra, 553 F.2d at 269 (quoting *Taylor v. New York City Transit Authority,* 309 F.Supp. 785, 791 (E.D.N.Y.), *aff'd,* 433 F.2d 665 (2d Cir. 1970)). Although New York courts would — and did —

accord the Commissioner's unappealed decision preclusive effect, other factors would argue against our following suit. In *Plano v. Baker,* 504 F.2d 595 (2d Cir. 1974), we noted that a hearing before the Commissioner of Education is little more than a round table discussion, and we discussed its procedural inadequacies, which include the inability to examine or cross-examine witnesses. *Id.* at 598 & n. 5. These procedural inadequacies, which led us in *Plano* to conclude that the § 1983 plaintiff was not required to exhaust his administrative remedy of appeal to the Commissioner, argue against giving his determination preclusive effect. More significant, however, is that here, as in *Plano,* the constitutional issues raised "lie within the expertise of courts, not the expertise of administrators." *Id.* at 599 (footnote omitted). Finally, in view of the nature of Gargiul's claim and her employment status at the time of her appeal to the Commissioner, it is doubtful that either party expected that the Commissioner would have the final word on Gargiul's constitutional claims. Accordingly, we hold that Gargiul is not precluded from challenging her suspension without pay on substantive due process grounds.

[5] We turn then to the merits of Gargiul's claim. The fourteenth amendment prevents the state from depriving any person of liberty or property without due process of law. Protected property interests are defined not by the Constitution, but by "existing rules or understandings that stem from an independent source such as state law . . . ." *Board of Regents v. Roth,* 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d

548 (1972). Gargiul's position as a tenured teacher was indisputably a property interest protected by the Fourteenth amendment. *Perry v. Sindermann*, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972). Gargiul was entitled, under New York law, to certain substantive and procedural safeguards against deprivation of that interest. *See* N.Y. Educ. Law §§ 3012, 3020, 3020-a (McKinney 1981). Accordingly, principles of substantive due process require that the Board's actions impairing that interest have a rational relation to a proper governmental purpose. *See Koch v. Yunich*, 533 F.2d 80, 84 (2d Cir. 1976). If Gargiul's lengthy suspension without pay resulted from an arbitrary or capricious exercise of the Board's power, her due process rights were violated. *See Brenna v. Southern Colorado State College*, 589 F.2d 475 (10th Cir. 1978); *Simard v. Board of Education*, 473 F.2d 988, 994 (2d Cir. 1973).

Appel ant maintains that a strict standard of constitutional scrutiny should be applied. She argues that the physician-patient relationship is one of particular intimacy; that her request for an examination by a physician of the same sex was protected by her fundamental, constitutional right to privacy; and that the Board's directive interfering with that right can be justified only by a compelling state interest. We recognize that, in view of the intimate nature of a physical examination by a physician, Gargiul's preference for a physician of the same sex must be considered more than a "mere personal predilection." Consequently, the nature of her preference is necessarily accorded some weight in our determination of the reasonableness of the Board's actions. However, we find it unnecessary to determine whether there is a " 'fundamental' " right to be examined by a physician of the same sex " 'implicit in the concept of ordered liberty.' " *Roe v. Wade*, 410 U.S. 113, 152, 93 S.Ct. 705, 726, 35 L.Ed.2d 147 (1973) (quoting *Palko v. Connecticut*, 302 U.S. 319, 325, 58 S.Ct. 149, 152, 82 L.Ed. 288 (1937)), that may be infringed only with compelling

justification. We conclude, in the particular circumstances of this case, that the Board's actions with respect to Gargiul were so unreasonable as to be arbitrary.

Appellees maintain that the Board's directive was an entirely reasonable attempt to safeguard the health and welfare of Gargiul's students. There can be no dispute that safeguarding the health and welfare of students is a legitimate governmental objective, and that requiring a medical appraisal of a teacher's physical or mental fitness is rationally related to that objective. Nevertheless, we are convinced that in this instance the Board acted unreasonably in insisting that the medical appraisal be made by Dr. Day. Gargiul notified the Board at the outset that she would not be examined by a male physician. She suggested two alternatives, either of which was sanctioned by New York Education Law § 913. She offered to provide certification of her medical condition from her own physician, or to be examined, at her own expense, by any female physician selected by the Board, or recommended by a local medical society. Thus the Board's interest in getting an independent medical appraisal of Gargiul's condition rather than rely on the reports of Gargiul's own physician could have been served at least as well had it directed Gargiul to a specialist who was female rather than to Dr. Day.[4] Appellees argue further that the Board's insistence that Gargiul be examined by Day was reasonable because the Board has an interest in requiring teachers to be examined by one "particularly qualified expert" who understands the job-related physical requirements which teachers must meet. We find this argument to be without merit, for we are not persuaded that any particular expertise is necessary to understand the physical requirements of a kindergarten or first-grade teacher.

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[4]The Board's refusal to permit Gargiul to be examined by a female doctor rather than by its own male physician is even more unreasonable in light of the fact that the Board employs far more female than male teachers. Statistics submitted by counsel for the appellees indicate that in January 1975, 414 of the 636 teachers employed by the Board were women.

In view of Gargiul's offer to go at her own expense to any female physician selected by the Board, rather than to submit to a physical examination by the school district physician, who was male, the Board's actions with respect to Gargiul must be considered arbitrary. Therefore, we conclude that Gargiul's complaint does state a claim against defendants for violation of her substantive due process rights in connection with her suspension without pay.[5]

Accordingly, we reverse and remand the judgment of dismissal with respect to this claim. However, we affirm on collateral estoppel grounds the dismissal of Gargiul's constitutional claims concerning her dismissal.

OAKES, Circuit Judge (concurring in the judgment):

While I concur with Judge Tenney in the result his opinion reaches, I do so on a different ground. I would not reach the substantive due process question but would hold that the plaintiff's complaint that she was suspended for refusal to be examined by a male doctor alleges a violation of her constitutional right to privacy, a right I believe is part of a larger

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[5]We note, however, that Gargiul may not be entitled to recover for the entire period of her suspension. In *Kurzius v. Board of Education*, 81 A.D.2d 827, 438 N.Y.S.2d 824, *appeal discontinued*, 54 N.Y.2d 1027 (1981), the Appellate Division held that a teacher whose return to classroom duties was delayed by her own failure to have a previously requested report from her personal physician promptly transmitted to the school district physician was not entitled to back pay. *Kurzius* suggests that Gargiul is not entitled to be paid for any period during which her own failure to have her medical records sent promptly to Dr. Day delayed his decision concerning her fitness to return to work, and the necessity for a personal examination.

constitutional right of "personhood."[1] The right of privacy, first recognized by the Supreme Court in *Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965), has been fleshed out to some extent on an ad hoc basis, 1 N. Dorsen, P. Bender, & B. Neuborne, *Political and Civil Rights in the United States* 1008-23 (1976), with the result that its borders are not well defined. *See* Henkin, *Privacy and Autonomy*, 74 Colum.L.Rev. 1410, 1430 (1974). But while the contours of this protected sphere can be defined only with time and trial, the Constitution as we prize it is unthinkable without a right of privacy — a right to be let alone — and its entailments. And all our powers of privacy, whether they be our Fourth Amendment control over our property, control over the informational portrait of us available to the government and others, *see, e.g., Whalen v. Roe*, 429 U.S. 589, 97 S.Ct. 869, 51 L.Ed.2d 64 (1977), or control over the thoughts we may have, *see, e.g., Sobell v. Reed*, 327 F.Supp. 1294, 1305 (S.D.N.Y. 1971), doubtless have their origin in experience and in law in the person's control over her own body.

This right — to the dignity of one's bodily integrity — is as old as the common law and has been mentioned as being incorporated in the right of personal security identified in the 39th Article of Magna Charta. *See Davis v. Hubbard*, 506 F.Supp. 915, 931 (N.D. Ohio 1980). And the doctrine of informed consent, *see generally*, W. Prosser, *The Law of Torts* § 18, at 104-05 (4th ed. 1971), is an entire field of tort law that is related to the right to bodily integrity in the doctor's office.[2]

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[1] *See* Craven, *Personhood: The Right to be Let Alone*, 76 Duke L.J. 699 (1976). There are, of course, those who argue that privacy and personhood are merely a species of substantive due process. *See* Monaghan, *Our Perfect Constitution*, 56 N.Y.U.L. Rev. 353, 354 (1981).

[2] One supposes that bodily integrity in a medical sense is involved at the root of the underlying rationale of *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973). *See also Hawaii Psychiatric Society v. Ariyoshi*, 481 F.Supp. 1028, 1043-45 (D.Hawaii 1979).

Although compulsory vaccinations, *Jacobson v. Massachusetts*, 197 U.S. 11, 25 S.Ct. 358, 49 L.Ed. 643 (1905), compelled blood tests, *Schmerber v. California*, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966), and rectal cavity searches, *Rivas v. United States*, 368 F.2d 703 (9th Cir. 1966), *cert. denied*, 386 U.S. 945, 87 S.Ct. 980, 17

L.Ed.2d 875 (1967), have from time to time been upheld where there is clear necessity, procedural regularity, and little or no physical risk, *see* L. Tribe, *American Constitutional Law* 914-15 (1978), "in each case . . . [the] government's burden was to provide more than minimal justification for its action." *Id.* at 915.

Yet, even in prison, the social context where the government's prerogatives are most routinely upheld and the individual's liberties and decencies most routinely neglected, we have assumed that inmates have a right not to be viewed unclothed by guards of the opposite sex. *See Forts v. Ward*, 471 F.Supp. 1095 (S.D.N.Y. 1978), *rev'd on other grounds*, 621 F.2d 1210, 1214 & n. 6 (2d Cir. 1980) (female inmates). *Hudson v. Goodlander*, 494 F.Supp. 890, 893 (D.Md. 1980) (male inmates). A fortiori, complainants at a police station have been held to enjoy bodily privacy rights. *York v. Story*, 324 F.2d 450, 455 (9th Cir. 1963), *cert. denied*, 376 U.S. 939, 84 S.Ct. 794, 11 L.Ed.2d 659 (1964). Here, the State's reasons for disregarding Gargiul's rights are far less persuasive than in these other contexts, and I fail to see how a right shared by prisoners and arrestees cannot be enjoyed by a schoolteacher. It is true that the Supreme Court has never held whether a person has a constitutionally protected right to decline a physical

examination by a member of the opposite sex. But the Court has spoken broadly of the "protected intimate relationship" which "extends to the doctor's office." *See Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 66 n. 13, 93 S.Ct. 2628, 2640 n. 13, 37 L.Ed.2d 446 (1973). Moreover, there would be naked irony in the Court's protection of those who disrobe publicly to express themselves, *see Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 66, 101 S.Ct. 2176, 2181, 68 L.Ed.2d 671 (1981), alongside a refusal to protect those who express a desire to keep their clothes on. Even the Second Circuit's decision in *East Hartford Education Association v. Board of Education*, 562 F.2d 838, 856 (2d Cir. 1977) (en banc), permitting a school board to force teachers to adhere to a dress code, said nothing of a power to compel teachers to submit to examinations by physicians of the opposite sex.

Here the State's interests in a teacher's physical well-being primarily involve safeguarding the health and welfare of students, which can readily be served by an examination by a physician of the teacher's own sex. Uniform or consistent application of standards might be a reason for having examination of all teachers by one physician but surely the standards of the medical profession are sufficiently uniform that this interest does not outweigh the individual teacher's above-minimal interest in bodily integrity. And, interestingly, the alternative solutions suggested by appellant Gargiul would, had the Board been flexible, have satisfied the statute under its terms.

All of this is not, of course, to say that a teacher has a right to examination by a physician of choice -- only an option to examination by a physician who is of the same sex as the teacher and who is otherwise competent and apt, where bodily integrity is threatened by the very act of examination. If this gives too much recognition to individual sensibilities or sensitivities, I would err on that side rather than on the side of an

all powerful state. *See* Oakes, *The Proper Role of the Federal Courts in Enforcing the Bill of Rights*, 54 N.Y.U.L. Rev. 911, 922, 931-32 (1979).

A-11

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the ninth day of May, one thousand nine hundred and eighty-three.

(SEAL)

LORRAINE GARGUIL,

Plaintiff-Appellant,

v.

VIRGIL E. TOMPKINS, *et al.*,

Defendants-Appellees.

No. 82-7482

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the defendant-appellee, Virgil E. Tompkins,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active

service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

A. Daniel Fusaro, Clerk
by

/s/ FRANCIS X. GINDHART,
Chief Deputy Clerk

A-12

GARGIUL v. TOMPKINS **795**
Cite as 525 F.Supp. 795 (1981)

Lorraine GARGIUL, Plaintiff,

v.

Virgil E. TOMPKINS, Individually and as District Superintendent of Liverpool Central School District, James Johnson, Individually and as Acting Superintendent of Liverpool Central School District, Dennis Jones, Individually and as Coordinator of Personnel of Liverpool Central School District, Dr. Paul A. Day, Individually and as Chief Medical Inspector for the Liverpool Central School District, F. Robert Kolch, Individually and as Clerk of the Board of Education of the Liverpool Central School District, Arthur D. Little, Bruce C. Vojt, Emilio Chasse, Doris Ann Connor, David A. Files, Marie Hartwell, Richard J. Jayko, Toni Anne Morris, Lloyd J. Spafford, as Individuals and as Members of the Board of Education of the Liverpool Central School District, the Board of Education of the Liverpool

Central School District, Liverpool, New York, and Arnold Dettor, as Hearing Officer appointed pursuant to the New York State Education Law, Defendants.

No. 76-CV-233.

United States District Court,
N. D. New York.

Oct. 30, 1981.

Female kindergarten teacher brought civil rights action arising out of her dismissal for refusal to submit to physical examination by male physician employed by school district. The District Court, Miner, J., held that teacher did not have constitutional right of privacy to refuse to submit to required physical examination by district-employed male physician since teacher's alleged interest in not being examined by male physician was neither fundamental nor implicit in concept of ordered liberty, but was mere personal predilection against male physicians.

Teacher's motion for partial summary judgment denied.

1. Federal Civil Procedure — 2544

Plaintiff which moves for summary judgment has dual burden of demonstrating that no genuine issue of material fact exists and that she is entitled to judgment as matter of law. Fed.Rules Civ.Proc. Rule 56(a, b), 28 U.S.C.A.

2. Constitutional Law — 82(11)
Schools — 127

Female kindergarten teacher did not have constitutional right of privacy to refuse to submit to required school district physical examination by district-employed male physician since teacher's alleged interest in not being examined by male physician was neither fundamental nor implicit in concept of ordered liberty, but was mere personal predilection against male physicians. 42 U.S.C.A. § 1983; N.Y.Education Law §§ 913, 3020-a; U.S.C.A.Const. Amends. 1, 3, 4, 9, 14.

3. Constitutional Law — 82(7)

Right to personal privacy is fundamental only when it is of such character that it cannot be denied without violating the fundamental principles of liberty and justice which lie at base of civil and political institutions; it must not be merely a personal opinion or predilection. U.S.C.A.Const. Amends. 1, 3, 4, 9, 14.

Bernard F. Ashe, Albany, N.Y., for plaintiff; Rocco A. Solimando, J. Michael Eadry, Albany, N.Y., of counsel.

O'Hara & O'Hara, Liverpool, N.Y., for defendants; Edward A. O'Hara, III, Liverpool, N.Y., of counsel.

MEMORANDUM-DECISION
AND ORDER

MINER, District Judge.

I.

This civil rights action arises out of the dismissal of plaintiff, for insubordination and incompetency, from her position as a tenured school teacher in the Liverpool Central School District. Jurisdiction is founded upon the provisions of 28 U.S.C. secs.

1331 and 1343 and 42 U.S.C. sec. 1983. Before the Court is plaintiff's motion for partial summary judgment awarding ". . . all back salary and benefits due her from the time of her suspension for refusal to take the physical examination by a male physician on March 17, 1975 until the date of her dismissal by the defendant Board on May 24, 1977." (par. 25, Affidavit of J. Michael Eadry in support of motion.)

II.

In September of 1974 plaintiff commenced to perform her duties as a kindergarten teacher for the 1974-75 school year. On November 27, 1974, she took a sick leave from her employment and thereafter informed school district officials that she would be able to return to her employment on March 17, 1975.

On February 5, 1975, the Superintendent of Schools notified plaintiff that, pursuant to both the teachers' collective bargaining agreement and sec. 913 of New York's *Education Law*, she should report to the chief school district physician, Dr. Paul Day, for physical examination. By further correspondence, the school district sought to obtain plaintiff's private medical records for evaluation by Dr. Day.

On March 10, 1975, the Board of Education adopted a resolution requiring plaintiff to submit to a physical examination by the school district physician, should the physician determine a physical examination was necessary after reviewing the plaintiff's medical records. After the medical records were supplied, Dr. Day determined that an examination would be necessary, and the plaintiff was so informed. However, the physician did not decide whether a "hands on" examination would be required, reserving decision on that question until plaintiff reported to his office for the initial meeting. It is uncontroverted that plaintiff never appeared at the office of Dr. Day and that she refused to be examined by him.

Shortly after March 10, 1975, the District placed plaintiff on a leave of absence without pay until such time as the questions

regarding her medical status were clarified. On September 5, 1975, plaintiff was charged by defendant Johnson, Acting Superintendent of Schools, with incompetency as a teacher and with insubordination for her refusal to be examined by Dr. Day. On May 24, 1977, after a hearing pursuant to sec. 3020-a of New York's *Education Law*, plaintiff was dismissed on grounds of insubordination and incompetency. In its determination, the Board of Education denied an allowance of back pay from March 17, 1975 on the ground that the suspension was due solely to plaintiff's refusal to be examined by the district physician and was not related to the later charges of incompetency. An appeal from the decision of the School Board was dismissed by the Commissioner of Education on February 24, 1976.

III.

Plaintiff Gargiul claims that she did not refuse to be examined by a physician. She asserts that defendants demanded that she be examined by a male physician, Dr. Day, and that an examination by a male physician violated her sense of privacy and was anathema to her private creed. Plaintiff is seeking partial summary judgment on the issue of back pay and benefits claimed to be due to her from March 17, 1975 until May 24, 1977. Plaintiff contends that her suspension without pay, based on her refusal to submit to an examination by a male physician, is a violation of privacy rights under the first,

fourth, ninth and fourteenth amendments to the U.S. Constitution. Plaintiff further contends that there are no disputes of fact concerning plaintiff's suspension without pay.

IV.

[1] Subdivisions (a) and (b) of Rule 56 Fed.R.Civ.P. authorize a motion for summary judgment "upon all or any part" of a claim by a claimant or a defending party. *See* Wright and Miller, *Federal Practice and Procedure*, sec. 2736. However, summary judgment is a drastic remedy which should be granted only when it is clear that the requirements of Rule 56 of the Fed.R.Civ.P. have been satisfied. *United States v. Bosurgi*, 530 F.2d 1105, 1110 (2d Cir. 1976). "[S]ummary judgment is to be used not as a substitute for trial, but only when '. . . it is quite clear what the truth is [and] that no genuine issues remain for trial.' *Sartor v. Arkansas Natural Gas Corp.*, 321 U.S. 620, 627 [64 S.Ct. 724, 729, 88 L.Ed. 967] (1944)." *Pfizer, Inc. v. International Rectifier Corp.*, 538 F.2d 180, 184-85 (8th Cir. 1976), *cert. denied*, 429 U.S. 1040, 97 S.Ct. 738, 50 L.Ed.2d 751 (1977). Indeed, the reviewing court must accept as true factual statements in the opposing party's affidavits; draw all permissible inferences in that party's favor, *Quinn v. Syracuse Model Neighborhood Corp.*, 613 F.2d 438 (2d Cir. 1980), *see also Hill v. A-T-O, Inc.*, 535 F.2d 1349 (2d Cir. 1976); and resolve any doubts in favor of the latter, *American Mfrs. Mutual Ins. Co. v. American Broadcasting-Paramount Theatres, Inc.*, 388 F.2d 272 (2d Cir. 1967). In short, plaintiff here has the dual burden of demonstrating that no genuine issue of material fact exists and that she is entitled to judgment as a matter of law. *Adickes v. S. H. Kress & Co.*, 389 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970). Plaintiff's motion for summary judgment must be denied because she has failed to establish that she is entitled to judgment as a matter of law.

V.

[2] The crux of plaintiff's argument is that plaintiff's constitutional right to privacy has been impermissibly violated by the defendants. While there is no "right to privacy" found in any specific guarantee of the Constitution, the Supreme Court has recognized that "zones of privacy," created by specific constitutional guarantees, impose limits upon government power. *See Roe v. Wade*, 410 U.S. 113, 153-155, 93 S.Ct. 705, 726-28, 35 L.Ed.2d 147 (1973), *see also Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965) (establishing that the right to privacy emanates from the "penumbras" of the first, third, fourth and ninth amendments to the Constitution); *see, e.g., Katz v. United States*, 389 U.S.

347, 351, 88 S.Ct. 507, 511, 19 L.Ed.2d 576 (1967), *Schmerber v. California*, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966). Moreover, the Supreme Court in *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), held that the constitutional protection of privacy was founded in the fourteenth amendment's due process guarantee of liberty. In *Roe* the Court pointed out that the personal rights found in this guarantee must be limited to those which are "fundamental" or "implicit in the concept of ordered liberty" as described in *Palko v. Connecticut*, 302 U.S. 319, 325, 58 S.Ct. 149, 82 L.Ed. 288 (1937). The activities detailed as being within this privacy definition are matters relating to ". . . marriage, procreation, contraception, family relationship and child rearing and education. . . . [In] these areas it has been held that there are limitations on the state's power to substantively regulate conduct." *Paul v. Davis*, 424 U.S. 693, 713, 96 S.Ct.

1155, 47 L.Ed.2d 405 (1976). The real question here is whether there exists a constitutional right for a female tenured teacher to refuse to submit to a required school district physical examination by a district-employed male physician. There does not. Plaintiff Gargiul's alleged interest is neither fundamental nor implicit in the concept of ordered liberty. It is a mere personal predilection against male physicians.

[3] A right to personal privacy is "fundamental only when it is of such character that it cannot be denied without violating the fundamental principles of liberty and justice which lie at the base of civil and political institutions." *Griswold, supra,* 381 U.S. at 493, 85 S.Ct. at 1686. It must not be a "personal opinion or predilection." *Roe v. Wade, supra,* 410 U.S. at 152, 93 S.Ct. at 726. Plaintiff does not allege that the School District's order of a physical examination by a male physician violates some ". . . marriage, procreation, contraception, family relationship[s] . . . or education interest . . ." *Paul v. Davis, supra,* 424 U.S. at 713, 96 S.Ct. at 1166. Instead plaintiff argues that an examination by a male physician would violate her sense of privacy and personal creed. Her argument is based on personal preference, not upon a well recognized principle of liberty and justice.[1] There simply is no constitu-

[1]The Supreme Court has recognized that the breadth of constitutional protection afforded the public is much greater than the protection afforded public servants. *See, e.g., Kelley v. Johnson,* 425 U.S. 238, 96 S.Ct. 1440, 47 L.Ed.2d 708 (1976) (where police departments were allowed to promulgate regulations governing the appearance of its officers); *cf. Cleveland Board of Education v. LaFleur,* 414 U.S. 632, 94 S.Ct. 791, 39 L.Ed.2d 52 (1974) (where the court struck down school regulations which required mandatory commencement of maternity leave during early months of pregnancy; however, the court noted that certain reasonable regulations are enforceable, including reliance on a school district physician to determine the ability of a teacher to teach during early months of pregnancy). Along these lines it is not wholly unreasonable for the School District to order an employee to consult a physician — even a male one — to determine the status of a disability claim under New York's *Education Law,* sec. 913. *See Brodsky v. Board of Education of Brentwood,* 64 A.D.2d 611, 406 N.Y.S.2d 533 (2nd Dept. 1978) for an interpretation of sec. 913 constitutionality.

tionally recognized right to refuse a medical examination because the physician is a male.

In light of the foregoing, plaintiff's motion for partial summary judgment hereby is denied.

It is so Ordered.

LORRAINE GARGIUL,

Plaintiff,

-against-

VIRGIL E. TOMPKINS, Individually and as District Superintendent of Liverpool Central School District, JAMES JOHNSON, Individually and as Acting Superintendent of Liverpool Central School District, DENNIS JONES, Individually and as Coordinator of Personnel of Liverpool Central School District, DR. PAUL A. DAY, Individually and as Chief Medical Inspector for the Liverpool Central School District, F. ROBERT KOLCH, Individually and as Clerk of the Board of Education of the Liverpool Central School District, ARTHUR D. LITTLE, BRUCE C. VOJT, EMILIO CHASSE, DORIS ANN CONNOR, DAVID A. FILES, MARIE HARTWELL, RICHARD J. HAYKO, TONI ANNE MORRIS, LLOYD J. SPAFFORD, as Individuals and as Members of the Board of Education of the Liverpool Central School District, THE BOARD OF EDUCATION OF THE LIVERPOOL CENTRAL SCHOOL DISTRICT, Liverpool, New York, and ARNOLD DETTOR, as Hearing Office appointed pursuant to New York State Education Law,

Defendants.

FINAL ORDER

Index No. 76-CV-233

Defendants having moved for Summary Judgment in this cause, pursuant to Rule 56(b) of the Federal Rules of Civil Procedure, and

The said motion having been brought on for argument at a Term of this Court held at the United States Courthouse in the City of Albany, New York on the 10th day of May, 1982, O'Hara, Lahm & Felice, Kenneth A. Windstein, Esq. of Counsel, appearing on behalf of the defendants in support of the motion and Joseph F. Falco, Esq. appearing on behalf of the plaintiff in opposition thereto,

Now, upon reading and filing the Notice of Motion for Summary Judgment, the Supporting Affidavit of Dennis G. O'Hara, sworn to on the 2nd day of March 1982, with exhibits annexed, the Memorandum of Law in Support of the Motion, dated April 26, 1982, the Memorandum of Law in Opposition to the Motion, dated April 21, 1982, and the other records, files, and proceedings in this action, and due deliberation having been had thereon,

Now, upon the motion of O'Hara, Lahm & Felice, Kenneth A. Windstein, Esq., of Counsel, attorneys for the defendants, it is

ORDERED that the defendants' motion for summary judgment be, and hereby is, granted on the ground that the plaintiff has failed to put forth a claim upon which relief can be granted under Title 42, Section 1983 of the United States Code, and it is further

ORDERED that this action be, and hereby is dismissed upon the merits.

ENTER:

Dated May 17, 1982.
Albany, NY

Submitted By:

/s/ KENNETH A. WINDSTEIN, ESQ.
O'Hara, Lahm & Felice
1020 Seventh North Street
Liverpool, New York 13088
Telephone: (315) 451-3810

/s/ ROGER J. MINER
U.S. District Judge

"I certify that
This is a true copy

Attest May 17, 1982
J.R. TULLY
Clerk, U.S. District Court

By: Frank S. Haker (???)
Deputy

54 A.D.2d 1085

Application of Lorraine GARGUIL,
Appellant,

v.

BOARD OF EDUCATION OF the LIVERPOOL CENTRAL SCHOOL DISTRICT, Respondent.

Supreme Court, Appellate Division,
Fourth Department.

Nov. 5, 1976.

Tenured teacher who had been suspended without pay because of her refusal to submit to a physical examination by the school district medical inspector brought proceeding against the board of education for a declaration that the suspension violated the Education Law. The Supreme Court, Onondaga County, Donald A. Miller, J., dismissed the proceeding as time barred, and the teacher appealed. The Supreme Court, Appellate Division, held that the proceeding was time barred under the applicable statute of limitations and on account of laches.

Judgment and order affirmed.

1. Mandamus — 143(1)

Four-month statute of limitations applicable to proceedings against a body or an officer begins to run after determination to be reviewed becomes final and binding on the petitioner, i.e., when the decision or action has an actual impact on petitioner. CPLR 217.

2. Mandamus — 143(1)

In an Article 78 proceeding in the nature of mandamus, period of limitations runs from the respondent's refusal, on petitioner's demand, to perform its duty; however, demand must be made within a reasonable time. CPLR 217, 7801 et seq.

3. Schools and School Districts — 141(5)

Where tenured teacher who was suspended without pay did not commence proceeding against board of education until almost 13 months after the suspension and more than four months after the board of education moved to dismiss a previous proceeding by the teacher, which motion unequivocally indicated the board's refusal to pay the teacher's salary, action was time barred. CPLR 217, 7801 et seq.

4. Schools and School Districts — 141(5)

Even if tenured teacher who was suspended without pay made demand on April 1, 1976, proceeding commenced on April 13, 1976, was time barred on account of laches where, inter alia, teacher had been suspended on March 17, 1975, and teacher's delay in making demand was, under the circumstances, unreasonably protracted. CPLR 217, 7801 et seq.; Education Law § 913.

Bernard F. Ashe, Richard C. Heffern, Albany, for appellant.

O'Hara, O'Hara & Vars, Michael J. Kawa, Liverpool, for respondent.

Before MOULE, J. P., and CARDAMONE, SIMONS, MAHONEY and DILLON, JJ.

MEMORANDUM:

In this Article 78 proceeding against the respondent Board of Education of Liverpool Central School District, the appellant, Lor-

raine Garguil, who seeks a declaration that her suspension without pay as a tenured school teacher was a violation of section 3020-a of the Education Law, has appealed an order and judgment at Special Term which dismissed her proceeding as time-barred under CPLR 217.

Appellant, a tenured teacher, employed by respondent for fifteen years suffered a back ailment in 1974 and asked for a first grade position where she believed there would be less stress. Respondent did not have an opening and instead offered her a kindergarten position on June 18, 1974. Appellant refused respondent's request, however, to have a physical examination by the School District physician prior to the beginning of the 1974 school year. Appellant was out on sick leave throughout the late fall of 1974 and the early winter of 1975 and advised respondent in February of her intent to return to work on March 17, 1975. In response to respondent's repeated requests that she submit to the required physical examination, appellant stated that she had always gone to women physicians and that it was against her "creed" to be examined by a male physician.

On March 10, 1975 the respondent Board adopted a resolution which directed appellant to submit to a physical examination by the School District medical inspector and advised her that without such examination she would not be permitted to return to her teaching position. This resolution was adopted pursuant to the respondent's power under section 913 of the Education Law and a copy of the resolution was forwarded to appellant on March 17, 1975. Thereafter, on March 21, 1975 the appellant was notified that as a result of the March 10, 1975 resolution, she was being placed on a leave of absence without pay, pending a decision as to her medical problems. At approximately two week intervals, from March 24, 1975 until June 27, 1975 (the end of that school year), appellant wrote letters to the Co-ordinator of Personnel of the School District, the Accounting Department, and the Treasurer of the School District, demanding that she be paid her salary during the period of her leave of absence.

[1] The four-month Statute of Limitations begins to run after the determination to be reviewed becomes final and

binding upon petitioner, i.e., when the decision or action has an actual impact on appellant (8 Weinstein-Korn-Miller, N.Y. Civ. Prac., para. 7804.02; 24 Carmody-Wait 2d, N.Y. Prac., §145:239). It has been held that "where a determination is made on one date to be effective at a later date, the determination does not become 'final and binding' for purposes of the Statute of Limitations (CPLR 217) until the date it becomes effective" (*Matter of Wininger v. Williamson*, 46 A.D.2d 689, 360 N.Y.S.2d 262; *Gates v. Walkley*, 41 A.D.2d 319, 342 N.Y.S.2d 490). Were the instant proceeding to be categorized as one to review a determination (i.e., in the nature of certiorari), CPLR 217 would bar the proceeding because respondent Board suspended appellant without pay effective March 17, 1975. The petition, however, was not served until April 13, 1976, more than twelve months later, and well beyond the applicable four-month period of limitations.

[2] This proceeding, however, seems best classified as one where there is a failure of the body or an officer to perform its duty (*Matter of Soucy v. Board of Education*, 51 A.D.2d 628, 378 N.Y.S.2d 500; *Matter of Ferro v. Lavine*, 46 A.D.2d 313, 362 N.Y.S.2d 591). In an Article 78 proceeding in the nature of mandamus the period of limitations runs from "the respondent's refusal, upon the demand of the petitioner . . . , to perform its duty" (CPLR 217), but the demand must be made within a reasonable time or the petitioner will be barred (see, *Austin v. Board of Higher Educ. of City of N.Y.*, 5 N.Y.2d 430, 442-443, 186 N.Y.S.2d 1, 10-12, 158 N.E.2d 681, 687-688). *In Matter of Sirles v. Cordary*, 49 A.D.2d 330, 332, 374 N.Y.S.2d 793, 795, the Court held that: "(t)he weight of authority . . . supports the proposition that an employee . . . who is discharged from his governmental position without a hearing is not required to seek reinstatement within four months from discharge, but

may delay until such time as he has demanded reinstatement and has been refused, provided he has not so unduly delayed seeking reinstatement as to be guilty of laches (*Matter of Burke v. Village of Johnson City*, 36 A.D.2d 202, 319 N.Y.S.2d 788, affd. 29 N.Y.2d 846, 328 N.Y.S.2d 1, 277 N.E.2d 923; see also, *Austin v. Board of Higher Education of City of N.Y.*, 5 N.Y.2d 430, 186 N.Y.S.2d 1, 158 N.E.2d 681)". (See also, *Mtr. of Johnson v. Downstate Med. Center, State Univ. of N.Y.*, 52 A.D.2d 357, 361-362, 384 N.Y.S.2d 189, 192-193; *Flomenbaum v. Drug Abuse Control Comm.*, 50 A.D.2d 20, 377 N.Y.S.2d 211; *Matter of Durham v. Amico*, 52 A.D.2d 724, 382 N.Y.S.2d 169).

[3, 4] Appellant variously demanded her salary in (1) letters written between March 24, 1975 and June 27, 1975; (2) a formal grievance demanding her salary (April 10, 1975); (3) an appeal to the Commissioner (August 9, 1975); (4) an Article 78 petition against respondent (November 25, 1975, withdrawn on December 12, 1975) and (5) a letter from her attorney (April 1, 1976). Respondent throughout this period steadfastly refused to pay appellant her salary. Such, in our view, constituted at least an informal refusal to act. Respondent Board's formal "refusal" was its motion to dismiss dated December 6, 1975 in appellant's previous Article 78 petition which she subsequently withdrew. The instant proceeding was not commenced until April 13, 1976 almost thirteen months after the March 17, 1975 suspension and more than four months after respondent board's motion to dismiss the previous proceeding which unequivocally indicated its refusal to act to pay appellant's salary. It is also, therefore, time-barred.

Even were we to find that appellant's demand was made on

April 1, 1976, the date of her attorney's letter, we would also conclude that it is barred on account of her laches because her delay in making the demand, under the circumstances of this case, was unreasonably protracted (cf. *Matter of Perry v. Blair*, 49 A.D.2d 309, 314-315, 374 N.Y.S.2d 850, 855-857). Finally, we have considered appellant's argument that she was denied due process and find it to be without merit (*Matter of O'Keefe v. Murphy*, 38 N.Y.2d 563, 381 N.Y.S.2d 821, 345 N.E.2d 292; *Matter of Perry*, supra).

Judgment and order unanimously affirmed without costs.

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Decided February 15, 1977 — Continued
41 N.Y.2d 801 — Continued

Shea v. Ross,
385 N.Y.S.2d 417, 53 A.D.2d 945 . . . . . denied
Van Camp v. Weitz,
388 N.Y.S.2d 1009, 54 A.D.2d 884 . . . . . denied
Williams v. Barlow. . . . . denied

Decided February 17, 1977.
41 N.Y.2d 802

ATI, Inc. v. Ruder & Finn, Inc.,
389 N.Y.S.2d 540, 55 A.D.2d 540 . . . . . granted
Bender v. State of New York,
388 N.Y.S.2d 47, 54 A.D.2d 809. . . . . dismissed
Lefkowitz v. Leigh Realty Co., Inc.,
387 N.Y.S.2d 465, 54 A.D.2d 715 . . . . . denied

Preisch v. Continental Casualty Company,
389 N.Y.S.2d 700, 55 A.D.2d 117 . . . . . denied

Sunbeam Corporation v. Morris
Distributing Company, Inc.,
389 N.Y.S.2d 173, 55 A.D.2d 722 . . . . . denied

Tuttle v. Juanis,
387 N.Y.S.2d 167, 54 A.D.2d 589. . . . . dismissed

Decided February 22, 1977.
41 N.Y.2d 802

Axelsen v. Department of Personnel
of City of New York,
389 N.Y.S.2d 790, 55 A.D.2d 536 . . . . . denied

Brogan, Matter of,
389 N.Y.S.2d 125, 54 A.D.2d 504 . . . . . denied

Callagy v. New York City Employee's
Retirement System,
387 N.Y.S.2d 397, 54 A.D.2d 622 . . . . . denied

Edgar v. Harris,
389 N.Y.S.2d 631, 55 A.D.2d 597. . . . . dismissed

Farmers National Bank of Malone v. Tulloch,
389 N.Y.S.2d 494, 55 A.D.2d 773 . . . . . denied

Flushing National Bank v. Pinetop Buidling Corp.,
387 N.Y.S.2d 8, 54 A.D.2d 555 . . . . . granted

Gargiul v. Board of Education of
Liverpool Central School District,
389 N.Y.S.2d 504, 54 A.D.2d 1085 . . . . . denied

Greater New York Savings Bank v. Boothe,
387 N.Y.S.2d 998, 54 A.D.2d 900 . . . . . denied

Jamaica Buses, Inc. v. Moran,
387 N.Y.S.2d 1021, 54 A.D.2d 934 . . . . . denied

Larkin v. Farrell,
384 N.Y.S.2d 605, 52 A.D.2d 1069 . . . . . denied

Larkin v. Town Board of Town of Fleming,
384 N.Y.S.2d 603, 52 A.D.2d 1068 ..... denied

Rosano v. Steinway & Sons,
387 N.Y.S.2d 730, 54 A.D.2d 800 ..... denied

Tandem Holding Corp. v. Board of Zoning
Appeals of Town of Hempstead,
385 N.Y.S.2d 119, 53 A.D.2d 697 ..... granted

69 A.D.2d 986

In the Matter of the Application of Lorraine M. GARGIUL, Petitioner,

v.

BOARD OF EDUCATION OF the LIVERPOOL CENTRAL SCHOOL DISTRICT et al., Respondents.

Supreme Court, Appellate Division,
Fourth Department

April 6, 1979.

Article 78 proceeding seeking to annul dismissal of school employee was transferred by order of the Onondaga Supreme Court, George G. Inglehart, J. The Supreme Court, Appellate Division, held that: (1) finding that school employee was incompetent was supported by substantial evidence, and punishment of dismissal was not so disproportionate as to be shocking to one's sense of fairness; (2) board of education may dismiss employee who refuses to undergo a medical examination, and (3) petitioner could not relitigate propriety of suspension without pay where she had not sought review of the determination of Commissioner of Education dismissing appeal therefrom nor joined the Commissioner in the Article 78 proceeding.

Determination confirmed.

1. Schools — 63(1)

Finding that school employee was incompetent was supported by substantial evidence, and punishment of dismissal was not so disproportionate as to be shocking to one's sense of fairness.

2. Schools — 63(1)

A board of education has statutory right to order an employee to submit to a medical examination, and may dismiss an employee who refuses to undergo such an examination. Education Law § 913.

3. Schools — 63(1)

Where dismissed school employee neither sought review of determination of the Commissioner of Education upholding her suspension without pay nor joined the Commissioner as party in Article 78 proceeding seeking to annul her subsequent dismissal, she was bound by the determination of the Commissioner as to questions which should have been raised on direct proceeding for review of his determination and could not relitigate the propriety of her suspension without pay in the Article 78 proceeding. CPLR 7801 et seq.; Education Law § 310.

Bernard F. Ashe, Albany, for petitioner, arg by Richard E. Casagrande, Albany.

O'Hara, O'Hara & Vars, Liverpool, for respondents, arg by Dennis G. O'Hara, Liverpool.

Before DILLON, P. J., and CARDAMONE, SIMONS, DOERR and MOULE, JJ.

MEMORANDUM:

In this CPLR article 78 proceeding petitioner seeks to annul the determination of the Board of Education of the Liverpool Central School District which found that she was insubordinate and incompetent and dismissed her from her employment retroactive to March 17, 1975.

[1] The Board's finding that petitioner was incompetent is supported by substantial evidence and the punishment imposed is not so disproportionate "as to be shocking to one's sense of fairness" (*Matter of Pell v. Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 N.Y.2d 222, 233, 356 N.Y.S.2d 833, 834, 313 N.E.2d 321).

[2, 3] We do not agree with petitioner's contention that she should be awarded back pay from March 17, 1975, the date on which she was suspended for refusing to submit to the physical examination directed by the Board, to the date of her dismissal. A Board of Education has a statutory right to order an employee to submit to a medical examination (Education Law, § 913) and may dismiss an employee who refuses to undergo such an examination (*Matter of the Appeal of Frank Grasso*, 4 E.D.R. 174). Further, petitioner appealed from her suspension without pay for refusing to submit to a medical examination under section 310 of the Education Law (15 Ed Dept 360, applic. for reopening den. 15 Ed Dept Rep 520). The Commissioner dismissed the appeal, finding that the Board was authorized under section 913 of the Education Law to require such an examination and that the Board's action was neither arbitrary nor capricious. The Commissioner also rejected petitioner's claim that her desire to be attended only by a woman physician was protected by section 296 of the Executive Law and the Federal Constitution. Petitioner neither sought

review of the Commissioner's determination nor joined the Commissioner as a party in this article 78 proceeding; accordingly, petitioner is bound by the determination of the Commissioner as to questions which should have been raised on a direct proceeding for review of his determination and she may not relitigate the propriety of her suspension without pay in this article 78 proceeding (see *Matter of Chapin v. Board of Educ., City of Buffalo*, 291 N.Y. 241, 52 N.E.2d 113; *Matter of Karin v. Board of Educ. of Cent. School Dist. No. 1 of Towns of New Hartford, Kirkland & Paris*, 56 A.D.2d 721, 393 N.Y.S.2d 135, mot. for lv. to app. den. 41 N.Y.2d 806, 396 N.Y.S.2d 1025, 364 N.E.2d 850; *Anken v. Bd. of Educ. of Cent. School Dist. No. 1 of Town of Sandy Creek*, 42 A.D.2d 1031, 348 N.Y.S.2d 610).

Finally, the several constitutional issues that petitioner has raised concerning the charge of insubordination are not reached or determined in this case because we have concluded that there is substantial evidence in the record to support the dismissal on the independent ground of incompetency.

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MOTIONS FOR LEAVE TO APPEAL 1031

Decided Oct. 11, 1979 — Continued
48 N.Y.2d 606 — Continued

Siebert (Citizens Savings & Loan Association of New York), Matter of
415 N.Y.S.2d 910, 70 A.D.2d 575 . . . . . denied

Sweet v. Glantz,
416 N.Y.S.2d 160, 69 A.D.2d 1025 . . . . . denied

Talarico v. Kroneiss,
____ N.Y.S.2d ____, ____ A.D.2d ____ . . . . . denied

Wasserman v. Malcolm & Hayes, Inc.,
____ N.Y.S.2d ____, 70 A.D.2d 1064 ..... denied

Decided Oct. 16, 1979
48 N.Y.2d 606.

Bainer, Matter of
419 N.Y.S.2d 228, ____ A.D.2d ____ ..... denied

Basile v. Levitt,
417 N.Y.S.2d 811, 70 A.D.2d 999 ..... denied

Flynn v. Bates,
413 N.YS.2d 446, 67 A.D.2d 975..... denied

Fritz v. Board of Education of
Union Free School District No. 22,
416 N.Y.S.2d 74, 70 A.D.2d 593..... dismissed

Gargiul v. Board of Education of
Liverpool Central School District,
417 N.Y.S.2d 119, 69 A.D.2d 986 ..... denied

Gyder v. Blum,
418 N.Y.S.2d 715, 68 A.D.2d 714 ..... denied

Miracle Mile Associates v. Yudelson,
417 N.Y.S.2d 142, 68 A.D.2d 176 ..... denied

Pigno v. Bunim,
415 N.Y.S.2d 50, 69 A.D.2d 814 ..... denied

Rodriguez v. Meyerson,
418 N.Y.S.2d 936, 69 A.D.2d 162 ..... denied

In the Matter of the appeal of LORRAINE GARGIUL from action of the Board of Education of the Liverpool Central School District and James P. Johnson, Acting Superintendent of Schools, regarding medical examination.*

Decision No. 9210

(February 24, 1976)

*For a reopening of this appeal, see p. 520.

Bonnie Strunk, Esq., attorney for petitioner

O'Hara, O'Hara & Vars, Esqs., attorneys for respondents, Dennis G. O'Hara, Esq., of counsel

NYQUIST, Commissioner. — Petitioner appeals from respondents' directive that she be examined by the district's physician prior to resuming her teaching duties.

Petitioner is a tenured teacher employed by respondent district to teach kindergarten. By letter dated June 13, 1974, petitioner requested a change of assignment, for medical reasons, to a first-grade class. No opening was available at the time, and petitioner was offered two half-time kindergarten positions. When it was determined that petitioner intended to remain in respondent's employ, she was directed by the superintendent of schools, Virgil Tompkins, to make an appointment to be examined by the school district's physician prior to returning to school. On August 19, 1974, the field representative of New York State United Teachers, Inc. wrote to Superintendent Tompkins stating in part that petitioner would be willing to have a physical examination by her physician, Dr. Marie Wasileska, or any woman physician named by the district. Respondents' attorney contacted the

NYSUT field representative by letter on September 3, 1974 and, citing Education Law § 913, informed the representative that petitioner would be required to submit to a medical examination by the school district's physician, Dr. Paul Day. It is alleged by respondents' attorney that the NYSUT field representative informed him that petitioner was willing to be examined by Dr. Day. However, petitioner returned to work in

September 1974 without having been examined. On November 27, 1974, petitioner commenced a sick leave.

Petitioner's private physician wrote respondents on December 7, 1974 certifying that petitioner was under her care and would not be able to return to work for several weeks. No reason was given for the absence. By letter dated February 5, 1975, Superintendent Tompkins renewed the directive that petitioner be examined by the school district's physician. On February 11, Superintendent Tompkins provided petitioner with medical authorizations to enable her private physicians to release her medical records to the district's physician. Petitioner informed Superintendent Tompkins, by letter, on February 24, 1975 of her intention to return to work on March 17, 1975. Superintendent Tompkins wrote on February 27 directing that petitioner make an appointment to see Dr. Day and enclosing additional medical authorizations, since the earlier ones had not been returned by petitioner. By letter dated February 28, 1975 and several succeeding letters, petitioner informed Superintendent Tompkins that she has been treated exclusively by women physicians and did not wish to be examined by Dr. Day. Petitioner stated she would be willing to be examined by any woman physician designated by respondents.

At its March 10, 1975 meeting, respondent board of education adopted a resolution requiring that petitioner by examined by Dr. Day, if found to be necessary, in accordance with Education Law § 913 before being permitted to return to her teaching duties. Petitioner was placed on leave of absence without pay.

On March 13, 1975, Superintendent Tompkins wrote petitioner to advise that Dr. Day indicated a physical examination might not be necessary, depending upon the medical reports supplied by petitioner's physicians. It was

requested that petitioner execute the medical authorizations that had been supplied to her. The necessary authorizations were forwarded to the district during the latter part of March. Dr. Day determined that a physical examination would be necessary, and on July 30, 1975 petitioner was informed by respondent Johnson that the board of education directed that she be examined by Dr. Day.

On April 10, 1975, petitioner instituted a grievance, which

resulted in a decision by Justice Edward F. McLaughlin, Supreme Court, Onondaga County, dated October 30, 1975, permanently staying arbitration of this matter.

Petitioner contends that respondents are acting in an arbitrary and capricious manner in requiring petitioner to submit to a medical examination by their school district physician, a male, since they know petitioner will only be attended by women physicians. Petitioner also contends that such action infringes her constitutional rights under the First and Fourteenth Amendments of the United States Constitution and violates her statutory rights under Executive Law § 296. The statutory claim is based on petitioner's position that it is against her creed to be seen by a male physician.

Respondents contend that they are acting within their authority under Education Law § 913 in directing the medical examination by the school district's physician and that petitioner's personal preference in this regard does not constitute a creed.

Education Law § 913 provides in part:

> In order to safeguard the health of children attending the public schools, the board of education or trustees of

> any school district or a board of cooperative educational services shall be empowered to require any person employed by the board of education or trustees or board of cooperative educational services to submit to a medical examination by a physician of his choice or school medical inspector . . . in order to determine the physical or mental capacity of such person to perform his duties.

By its language, this section authorizes the employing board to determine if the individual is to be examined by his private physician or the school district's physician. Admittedly, respondents could have accepted the medical opinion of petitioner's own physicians as to her readiness to return to her teaching duties, but their decision to designate the school district's physician for this purpose is clearly within their authority and cannot be held arbitrary or capricious.

As interpreted, the statute empowers the board of education to require medical examination either by its own physician or a private physician chosen by the employee, as the board wishes (*Matter of Grasso*, 4 Ed Dept Rep 174 (1965). Respondents may reasonably prefer to accept the report or opinion of their own medical experts over those of another physician (*Matter of Jacobs*, 8 Ed Dept Rep 12 (1968); *Matter of Lifson*, 14 *id.* 93, pet to rev dis *sub nom Bd. of Ed. v. Nyquist et al.*, Albany Co Sup Ct, 6/3/75, n.o.r.; *Matter of Katz*, 15 Ed Dept Rep 145 (1975). Where

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this is the case and the teacher refuses to submit to the medical examination, he prevents the district from performing an essential statutory duty in protecting students from teachers

medically unable to perform their duties (*Matter of Sasso*, 14 Ed Dept Rep 130 (1974).

Consequently, I do not find that respondents acted arbitrarily or capriciously in requiring petitioner to be examined by the school district's physician, once their physician advised them as to the necessity of such examination.

Petitioner's contention that her wish to be attended by only women physicians is a creed protected by the Constitution and Executive Law § 296 is without merit. According to the transcipt of the grievance proceeding held on June 2, 1975, petitioner's objection to being examined by a male physician is based on a "personal belief" and it is not a tenet of any organized moral or religious group. This personal preference, as termed by respondents' counsel, is not tantamount to a "creed." Although petitioner states she has always been attended by women doctors, her June 13, 1974 letter to Superintendent Tompkins states that she has "been informed by Doctors Robert A. Bornhurst & Samuel Gingold and Dr. Marie C. Wasileska that there is a rotational SCOLIOSIS, convexity to the left, in the mid-lumbar area of my spine." It is not clear what role was played by the male physicians named by petitioner, but it appears that they did attend her. Petitioner also does not deny respondents' allegation that during the fall of 1974 petitioner consented, through her NYSUT field representative, to the examination by the school district's physician, a male.

THE APPEAL IS DISMISSED.

In the Matter of the application to reopen the appeal of LORRAINE GARGIUL from action of the Board of Education of the Liverpool Central School District and James P. Johnson, Superintendent of Schools, regarding medical examination.

Decision No. 9270

(June 15, 1976)

Bernard F. Ashe, Esq., attorney for petitioner, Richard C. Heffern, Esq., of counsel

O'Hara, O'Hara & Vars, Esqs., attorneys for respondent, Dennis G. O'Hara, Esq., of counsel

NYQUIST, Commissioner. — This is an application by petitioner to reopen *Matter of Gargiul* (15 Ed Dept Rep 360 (1976) on the grounds of misapprehension of fact and misapprehension of law.

In my prior decision, I found that respondent was authorized by Education Law § 913 to require petitioner to submit to a medical examination by the school medical officer. I also held that petitioner's refusal to be examined by male physicians was not based upon any right protected by the United States Constitution or by Executive Law § 296.

As a basis for reconsideration of my prior decision, petitioner contends that she was never examined by Drs. Robert Bornhurst and Samuel Gingold but that they reviewed x-rays taken by female x-ray technicians. Petitioner also contends that she never consented to an examination by the school medical officer. In support of this contention, petitioner submits the affidavit of a field representative of New York State United Teachers in which he denies ever indicating petitioner's consent to such examination.

Althouth I referred to both incidents in my previous decision, they did not constitute the sole basis for my determination. Petitioner's contention was that her personal practice of being attended by female physicians only constituted a "creed." This practice was found not to be a tenet of any organized moral or

religious group and was therefore not accorded the same pro-

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tection as a creed. My observations as to Drs. Bornhurst and Gingold and alleged prior consent to an examination by the school physician were addressed to the intensity of this personal belief and not to whether such a belief constituted a creed.

I would also note that upon an application to reopen, there must be new material evidence not available at the time of the original proceeding. Petitioner had ample opportunity to present evidence of the field representative in order to rebut respondent's allegation as to prior consent to examination by the school physician. No reason is offered upon this application for petitioner's failure to present this information in the initial proceeding.

Petitioner aserts, as a further basis for her application, that the previous decision permits an invasion of "petitioner's personal and sexual privacy" that is guaranteed by the United States Constitution. Once again, petitioner seeks to introduce matter that could have been raised in the initial proceeding. Petitioner's appeal to the Commissioner included the constitutional argument that respondent's order for a medical examination by the school physician "violates her creed in not being attended by male physicians (Executive Law section 296 and Fourteen Amendment and First Amendment" *(sic)*. Petitioner did not raise the privacy issue and is barred by the doctrine of *res judicata* from doing so now.

THE APPLICATION FOR A REOPENING IS DENIED.

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In the Matter of the Appeal of Frank Grasso from Action of the Board of Education, Central School District No. 1, Towns of Orangetown and Clarkstown, Rockland County, in Relation to His Dismissal.

Decision No. 7509

(May 27, 1965)

TEACHERS (tenure) — BOARD OF EDUCATION (powers and duties) — EDUCATION LAW, §§913, 3012

Appellant tenure teacher — dismissed on formal charges — charges were insubordination, neglect of duty, inefficiency — proper hearing held — charge of insubordination based on refusal of appellant to submit to medical examination by Board doctor although so ordered by Board — clear guilt of insubordination — sufficient basis for dismissal — not necessary to reach other charges — appeal dismissed.

Tobias & Vogel, Esqs., attorneys for appellant, Jerome Tobias, Esq., of counsel

Marshall K. Lynch, Esq., attorney for respondent

Allen, Jr., Commissioner. — The appellant herein was a teacher on tenure in the employ of the respondent school district. He was dismissed upon formal charges by action of the respondent Board on or about October 12, 1964.

Charges were brought against and served upon the appellant by the respondent Board pursuant to section 3012 of the Education Law. Such charges were (a) insubordination, (b) neglect of duty, and (c) inefficiency.

A hearing on the charges was had on October 1, 1964 before a committee appointed by the respondent Board. Both appellant and respondent herein were represented by

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counsel. The record indicates that witnesses were presented, the opportunity for cross-examination was available and testimony was recorded and a transcript made of the proceeding.

The charge of insubordination was based on the fact that the respondent board ordered the appellant, pursuant to authority granted to the Board of Education by section 913 of the Education Law to submit to a medical examination by the medical inspector of the Board of Education. This order was issued on or about March 20, 1964 and has never been complied with.

Section 913 of the Education Law reads in part as follows:

> "* * * the board of education * * * shall be empowered to require any person employed * * * to submit to a medical examination by a physician of his choice or school medical inspector of the board of education * * * in order to determine the physical or mental capacity of such person to perform his duties. The person required to submit * * * shall be entitled to be accompanied by a physician or other person of his own choice. * * *

This statute clearly gives to a board of education the right to order an employee to a medical examination by a physician of the employee's choice or, if the board so desires, by the board's medical inspector. The board may make demand for either type of examination as it chooses. If this were not so, the remaining language of the section would be meaningless.

The appellant, therefore, is clearly guilty of a deliberate

refusal to carry out a direct order of the Board of Education to submit to a medical examination to which the statute requires the teacher to submit.

The appellant is, therefore, guilty of insubordination. Such insubordination is a sufficient basis for the dismissal of a teacher. This statutory requirement of medical examination was deliberately placed in the statute so that boards of education could protect the children of the district and the education systems of this State from school employees medically unfit to carry out their duties.

Where a teacher refuses to report for such an examination, and thus thwarts the board in carrying out an essential

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statutory duty and where the teacher then is dismissed after a proper hearing and presentation of formal charges, I cannot find that a board of education has acted in a manner which can be considered arbitrary, capricious, or legally unreasonable.

Since this single specification, standing alone, is sufficient basis for the action of the respondent Board, it is not necessary to reach a determination relating to the other charges.

THE APPEAL IS DISMISSED.